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**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1957**

**No. ~~808~~ 37**

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**JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED  
STATES DEPARTMENT OF LABOR, PETITIONER**

**VS.**

**LUBLIN, McGAUGHY & ASSOCIATES, ET AL.**

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**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE FOURTH CIRCUIT**

**PETITION FOR CERTIORARI FILED FEBRUARY 21, 1958**

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**CERTIORARI GRANTED MARCH 31, 1958**

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**In the United States District Court for the Eastern District  
of Virginia, Norfolk Division**

**Civil Action No. 2070**

**JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES  
DEPARTMENT OF LABOR, PLAINTIFF,**

**v.**

**LUBLIN, MCGAUGHY AND ASSOCIATES, A COPARTNERSHIP, AND  
ALFRED M. LUBLIN, JOHN B. MCGAUGHY, WILLIAM T.  
MCMILLAN AND WILLIAM MARSHALL, JR., INDIVIDUALLY  
AND DOING BUSINESS AS LUBLIN, MCGAUGHY AND ASSOCI-  
ATES, DEFENDANTS**

**OPINION**

The questions presented in this action for injunctive relief instituted by the Secretary of Labor against the defendants are (1) whether certain of defendants' employees are engaged in commerce within the meaning of the Fair Labor Standards Act, 29 U. S. C. A., § 201, et seq., and (2) whether certain of defendants' employees are engaged in the production of "goods" within the meaning of said Act. Essentially one of the pertinent inquiries will be a determination of whether blueprints, drawings and specifications as prepared by employees of a firm of consulting engineers constitute "goods."

As defined in the Act under § 3 (i) the word "goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

Under § 3 (j) of the Act the word "produced" is defined to mean "produced, manufactured, mined, handled, or in any other manner worked on in any state; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in

producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any state."

According to the stipulation, exhibits and evidence in this case it appears, and the Court so finds, that defendants are a copartnership engaged in providing architectural and consulting engineer services under the firm name of Lublin, McGaughy and Associates, with its principal office at Norfolk, Virginia, and a branch office at Washington, D. C. The partners are also associated with foreign nationals in France and Italy, where they have engaged in engineering and architectural enterprises. At no time or place has the firm engaged in the business of construction contracting.

The complaint alleges violations of § 15 (a) (1) (2) and (5) of the Fair Labor Standards Act occurring subsequent to October 18, 1952, which violations relate to the overtime and record-keeping provisions of said Act. At the Norfolk and Washington offices there are approximately thirty and twenty employees respectively. Certain of said employees are engaged in drafting, preparing and designing drawings, plans, specifications and estimates for use and guidance of clients and clients' contractors in connection with the building and construction of military, commercial and other structures, and in the enlargement, extension and repair of military structures.

The percentage of work done for the Army and Navy is substantial. It is estimated that sixty per cent of the work done by the employees in the Norfolk office is for use by the Army Engineers or Navy Department. Approximately eighty-five per cent of the work performed in the Washington office is for the Army and Navy and for subdivisions of municipal governments in the area. Recently, defendants' Washington office has been engaged in the preparation of surveys, drawings, plans and specifications for the Washington Suburban Sanitation Commission which is located in Maryland. The government contracts admittedly require a great number of specifications which are reproduced by an independent blueprint company and are subsequently sent by the government agen-

cies to prospective bidders, many of whom are without the State of Virginia and the District of Columbia. The government agencies contacted by defendants have offices located in the Washington and Norfolk areas, and it is conceded that employees at the Washington office frequently go into Virginia and Maryland for the purpose of conferring as to the details of the work to be performed by defendants which, as a rule, is compensated for on a basis of a fixed negotiated fee. At least one-half of the work performed by the Washington office relates to construction projects outside the District of Columbia, and a substantial portion is for agencies whose offices are similarly removed from Washington.

Necessarily, a portion of the work performed by defendants and their employees consists of consultations with clients and prospective clients regarding architectural and engineering service with advice and recommendations relative thereto, as well as the preparation of engineering plans and preliminary reports. Such planning and preliminary studies are compensated for on a fixed fee basis.

The drawings, surveys, designs, plans and specifications are frequently, but not always, used by the clients in soliciting contractors' bids and for the construction of the clients' projects. According to contract and custom, such drawings, etc., remain the property of defendants unless the client is a federal, state, or other government agency, in which latter event the plans, drawings, etc., remain the property of the agency. The number of copies made available to the client vary according to the projects involved and the clients' requests, but for the fiscal year ending March 31, 1956, the cost of such copies of prints, specifications, etc., was approximately \$10,500.00, all of which are obtained from commercial blueprint establishments on order of defendants, but at the expense of the client. Defendants contend that these copies remain the property of defendants but, as a matter of practice, the copies provided to clients and their contractors are either worn out during the progress of the work, remain in the client's possession, or otherwise not returned to defendants as they are regarded by defendants as being of little or no value after they have



served their intended purpose. As to copies of such documents involving projects which are not constructed, or otherwise furnished to unsuccessful bidders, the same are generally reclaimed by defendants. Relative to nongovernment projects, a final copy of the blueprints showing all changes made during the course of construction is frequently retained by the client for his reference in making future repairs or alterations. As to private clients, the defendants' compensation is usually determined to be a sum equal to a fixed percentage of the cost of construction.

Prospective bidders on nongovernment projects are generally required to make a deposit of from \$15.00 to \$100.00 for the use of, and to assure the return of, plans, specifications, drawings, surveys, etc. When the documents are returned by the unsuccessful bidders, the deposits are refunded. As previously indicated, the contractors to whom the plans, etc., are forwarded or delivered are located outside of Virginia and the District of Columbia but, of course, the plans, specifications, etc., are actually prepared by defendants in Virginia or the District of Columbia. The defendants frequently examine and tabulate competitive bids received for the purpose of ascertaining the low bidder and to make further recommendations to the client.

In government construction projects defendants do not generally provide any supervisory services. For private clients, approximately one-half of the projects require defendant's supervisory services from an architectural and/or engineering standpoint, as the work progresses, to determine whether the construction is proceeding in accordance with the plans and specifications. When such supervisory services are used, the defendants are representatives of the client, and the defendants' inspector reports to defendants any deviations from specifications. He also aids the defendants in estimating the value of labor and materials incorporated by the contractor in the project which is for the purpose of making payments as provided by the construction contract. This supervisory work is rendered by professionally trained employees and an additional charge is made for such service.

A portion of the work performed by certain of defendants' employees consists of supplying survey and field engineering services to contractors while construction work is in progress. These services are performed by field men, including surveyors, transit men and chain men, who generally work under the direction and supervision of a professionally trained engineer. The field men survey boundaries, take borings, check sewage maps, take measurements as construction progresses, and the like. They frequently travel from the District of Columbia to the site of the work in Maryland and thereafter return to defendants' office carrying with them the data used by defendants in connection with their work in behalf of their clients. Some of this work done by these field men has been in conjunction with such construction projects as widening streets on a Naval Operating Base near the base motor pool and post exchange, extending and paving airplane taxiways and parking aprons at Naval Air Station where admittedly aircraft land and depart for places outside the state, replacing paving between hangars at the Naval Air Station, and similar work at and near administrative buildings and machine shops located at the Norfolk Navy Yard and Norfolk Naval Base.

Since March 1, 1956, defendants have maintained a direct private telephone line between the Norfolk and Washington offices. Telephonic communications are numerous and the line is used for the purpose of controlling, supervising and coordinating the work of the Washington office from Norfolk. Payrolls for both offices, as well as for employees in foreign countries, are made up in the Norfolk office and checks are mailed to Washington and to foreign countries. It is freely conceded that all stenographic personnel employed in both offices write numerous letters, specifications and/or stencils for specifications, concerning the business of defendants, and address and mail same to out-of-state points.

The employees involved in this controversy are in the categories of draftsmen, field men and stenographers. It is stipulated that these classes of employees regularly work in excess of 40 hours per week without payment for excess hours of time and one-half, although defendants do not concede that the em-



ployees were not paid for the excess hours. They have merely stipulated that the employees were not paid strictly in accordance with the Act, if said Act is applicable.

As noted, the draftsmen prepare drawings, plans, specifications and estimates, many of which are transmitted across state lines; the field men, who have little or no duty in the office, frequently travel across state lines, make surveys, gather data, and thereafter bring the material compiled to the office where it forms a basis for the preparation of drawings, specifications, plans and estimates which, in turn, are frequently transmitted out of state; the stenographers type letters, specifications, checks, and other documents which are mailed to points out of the state, and also receive and handle long distance telephone calls from and to localities out of the state.

The only other question for determination is whether or not there is sufficient evidence to indicate that defendants' employees, who participate in the foregoing preliminary work, are directly connected with projects involving the construction, alteration or repair of instrumentalities of commerce.

The testimony indicates that approximately one-half of the charge made by an architect for his services to an owner is represented by plans and specifications. Admittedly this is an estimate depending upon the particular project and it is conceivable that this percentage will vary considerably. That the plans and specifications have a real value as far as the particular job is concerned can hardly be disputed. The Court could well take judicial notice of the facts that plans and specifications are essential to the construction of any modern building or project. These documents also have a potential value for later use in the event repairs and alterations become necessary. They probably have some intangible value in the field of education.

The legal question presented has been heretofore expressly decided by the able opinion of District Judge Chestnut in *McComb v. Turpin*, 81 F. Supp. 86. To elaborate on the scholarly discussion of the problem by Judge Chestnut would constitute idle repetition of the sound reasoning advanced by a distinguished jurist. With minor exceptions, the *McComb*



case covers the entire scope of the present controversy. In fact, plaintiffs concede that *McComb* is controlling, but argue that it was erroneously decided and, even if not accepted as an erroneous decision, it is modified by the decisions in *Mitchell v. Brown*, 8 Cir., 224 F. (2d) 359, and *Powell v. U. S. Cartridge Co.*, 339 U. S. 497, 70 S. Ct. 711, 94 L. Ed. 1007, both of which were decided subsequent to *McComb v. Turpin*, *supra*. With the first argument promoted by plaintiff the Court cannot agree. The *Powell* case merely holds, as far as pertinent herein, that a person employed by a private contractor at a Government-owned munitions plant operated by a contractor under a cost-plus-fixed-fee contract made with the United States, does come within the Fair Labor Standards Act. The employees in the three cases under consideration in *Powell v. U. S. Cartridge Co.*, *supra*, were (1) employed in the plant's safety department, (2) engaged as handlers, carriers and processors of explosives, and (3) working as truck drivers, fork-lift operators, loaders and unloaders of munitions. It is true that the *Powell* case does stand for the principle that munitions were "goods" within the meaning of the Act, even though such munitions were not intended for sale or resale. It further holds that such munitions, although produced for use in the prosecution of war, were nevertheless produced for "commerce."

*Mitchell v. Brown*, *supra*, appears to be in conflict with *McComb v. Turpin*, *supra*, although there are certain distinguishing features. The Eighth Circuit makes no reference to *McComb v. Turpin*, although the District Judge in *Mitchell v. Brown*, D. C. Iowa, 126 F. Supp. 603, relied substantially upon the conclusions reached by Judge Chestnut. The Eighth Circuit pointedly suggested that the activities of a "resident engineer" on a job involving repairs to an interstate highway was one factor aiding the Court in its conclusion. In the instant case any employee performing similar duties would be exempt as a "professional" employee and hence not within the Act. In fact, the gist of the determination by the Eighth Circuit lies in this brief comment:

In this case the activity of defendant's employees was in connection with the repair, alteration and improvement of existing instrumentalities of interstate commerce. Their duties, beyond the preparation of plans and specifications for a proposed construction project, required their presence at the job site as "resident engineer."

The defendants in this case do not have their draftsmen, field men and stenographers performing the duties of a "resident engineer". Even though *Mitchell v. Brown, supra*, may be considered in conflict with *McComb v. Turpin, supra*, this Court finds itself unable to disagree with the able discussion of the subject by Judge Chesnut.

Congress may determine to broaden the scope of the Fair Labor Standards Act to include all persons remotely connected with interstate commerce. Stenographers and law clerks or apprentices in legal offices may ultimately come within the Act as their daily work requires them to handle correspondence, legal briefs, and other documents which are continuously being forwarded across state lines. When such a point is reached, the Act will be all-inclusive and the employees of every business or profession will be subject to its provision.

Holding that none of the defendants' employees involved in this controversy are engaged in the production of "goods" for commerce within the meaning of the Act, little need be said on the remaining issue as to whether these same employees are engaged in commerce under the Act in question.

With the exception of the Washington field men who meet at the Washington office and then proceed to work in Maryland, the interstate movement of personnel is limited to the partners and their associates, all of whom are exempt from the Act. As to the military projects, while *Powell v. U. S. Cartridge Co., supra*, holds that munitions transported across state lines are produced for "commerce" even though used in the prosecution of war, it does not necessarily follow that the work performed by draftsmen, field men and stenographers, relating to the ultimate construction of buildings, air fields, etc., fall within a similar classification. *Laudadio v. White*

*Construction Co.*, 2 Cir., 163 F. (2d) 383. Whether employees are covered by the Act does not depend upon the nature of their employer's business, but upon the character of their own activities. *Divins v. Hazeltine Electronics Corp.*, 2 Cir., 163 F. (2d) 100. The evidence does not disclose wherein the particular employees involved were engaged in work of a commercial nature in performing their preliminary duties necessary to aiding their employers who are in the exempt class.

Relating to the nonmilitary projects, there is evidence that defendants did perform certain duties in connection with renovating an interstate bus terminal. If there was evidence establishing the fact that the employees involved performed services in connection with the repair or reconstruction of an existing instrumentality of commerce, such employees working on that particular contract would probably be covered by the Act. *Mitchell v. Vollmer*, 349 U. S. 427, 75 S. Ct. 860, 99 L. Ed. 1196; *Scholl v. McWilliams Dredging Co.*, 2 Cir., 169 F. (2d) 729. The application of the Act must be limited to the period covered by the charges and the particular contracts, if any, in which the employees in controversy were involved. The evidence discloses no other suggestion wherein these employees may have been engaged in commerce under the Act unless the military work is considered as such.

Following the logic and reasoning in *McComb v. Turpin*, *supra*, the Court is of the opinion that the complaint must be dismissed. This is not to say that architects preparing plans for general distribution to the public through the medium of magazines, etc., are not engaged in the production of "goods" within the meaning of the Act. Such a situation is entirely different from the present state of facts.

Counsel for defendants will prepare an appropriate order in accordance with this opinion which is adopted by the Court as its findings of facts and conclusions of law and, after submission to opposing counsel for inspection, present same to the Court for entry.

(S) WALTER E. HOFFMAN,  
United States District Judge.

NORFOLK, VIRGINIA, January 28, 1957.



[Caption omitted]

Civil Action File No. 2070

## ORDER OF DISMISSAL

The above cause came regularly on for trial before the Court on the 6th day of June 1956, and was duly submitted for consideration and decision upon the pleadings, the written stipulation entered into by the parties, the testimony of witnesses in open court, and various exhibits, and was argued by counsel on August 22, 1956, after submissions of briefs, and the Court, after due deliberation, rendered its decision, and on the 28th day of January, 1957, handed down its opinion setting forth in full its findings of facts, conclusions of law and order for judgment.

Now, therefore, pursuant thereto, it is determined, ordered and adjudged by the Court that the plaintiff's complaint be, and the same hereby is, dismissed on the merits, with prejudice. No costs will be assessed.

Enter:

[SEAL]

(S) WALTER E. HOFFMAN,  
Judge.

A true copy, Teste:

WALKLEY E. JOHNSON,  
Clerk.By (S) VERNICE T. HALL,  
Deputy Clerk.

NORFOLK, VA., February 21, 1957.

We ask for this:

HOFHEIMER &amp; NUSBAUM, p. d.,

By (S) ROBERT NUSBAUM.

Seen:

(S) JETER S. RAY,

(S) JOHN M. HOLLIS,

Asst. U. S. Atty.

[Caption omitted]

**STIPULATION**

The parties, in an effort to shorten the trial, agree as follows:

1. The defendants concede that the court has jurisdiction in this matter and that the plaintiff is the proper party to bring the action.

2. The defendants concede, for the purpose of this action that during the period covered by the complaint, and continuing to the present time, certain of their employees, including certain stenographers, draftsmen and field men, often worked in excess of forty (40) hours per week and that such employees were not paid overtime compensation for such excess hours.

3. Defendants concede, for the purpose of this action, that during a part of the period covered by the complaint they failed to make, keep and preserve records with respect to certain of their above-described employees showing the occupations, the hours worked each workday, the total hours worked each workweek, the regular hourly rate of pay and the total weekly overtime excess compensation. Following the investigation by the Wage and Hour Division, and prior to institution of this action, defendants commenced keeping and still are making and keeping all records required by the Act except the following: (a) occupations of employees; (b) a computation of the total weekly hours worked. Daily hours worked are recorded.

*Issues presented*

4. The parties agree that the principal question of law involved in this case is whether the defendants' employees are engaged in commerce or in the production of goods for commerce, within the meaning of the Act.

*Stipulation of facts*

5. Defendant Lublin, McGaughy and Associates is a copartnership composed of Alfred M. Lublin, John B. McGaughy,

William T. McMillan and William Marshall, Jr., all of whom reside in the city of Norfolk, within the jurisdiction of this court. Until on or about April 1, 1955, the said copartnership was composed of Alfred M. Lublin, John B. McGaughy and William T. McMillan. Defendants are, and, with the exception of William Marshall, Jr., at all times hereinafter mentioned were, engaged in providing architectural and consulting engineer services under the name and style of Lublin, McGaughy and Associates, at an establishment and place of business located at 220 West Freemason Street, Norfolk, Virginia, and at a branch establishment and place of business located at 1001 Connecticut Avenue, Washington, D. C. Defendant, William Marshall, Jr., likewise has been so engaged since on or about April 1, 1955. The partners of defendant firm are associated also with foreign nationals in France and Italy in engineering and architectural enterprises located in the vicinity of Paris, France and Milan, Italy. The defendants are architects and consulting engineers and are not engaged in the business of construction contracting. A job list of the work projects undertaken by the defendants during the period from the spring of 1954 to the end of April 1956 is attached hereto as Appendix A. Other projects undertaken prior to the spring of 1954 but completed after that date are not included in the attached list.

6. The defendants employ approximately thirty employees at their principal office in Norfolk and approximately twenty employees at their branch office in Washington, D. C. A detailed schedule of current employees, showing their qualifications and rates of pay is attached hereto as Appendix B. Since October 18, 1952, certain of defendants' employees (including some of those referred to in Paragraph No. 2 above) have been engaged in drafting, preparing and designing drawings, plans, specifications and estimates for use and guidance of clients and clients' contractors in connection with the building and construction of military, commercial and other structures, and in the enlargement, extension and repair of military structures. Representative samples of such drawings, plans, specifications and estimates are attached hereto as Appendix C.



7. Approximately 60% of the work done by defendants' employees in their Norfolk Office is done for the United States Army and Navy. Approximately 85% of the work done by defendants' employees in their Washington office is done for the United States Army and Navy and for subdivisions of municipal governments in the area. For example, in recent months the defendants' employees in their Washington office have prepared numerous surveys, drawings, plans, etc., for the Washington Suburban Sanitation Commission located in Maryland. Original, reproducible drawings and tracings (plans), and stencils for making multiple copies of specifications, are prepared by certain of defendants' employees described in paragraph 2 above and furnished by the defendants to the aforementioned government agencies. In one instance, job Number 860 (accomplished in the Norfolk office), in accordance with the terms of their contract, defendants furnished to the Fifth Naval District at Norfolk, Virginia, 200 copies of the specifications. These specifications were reproduced by an outside blueprint company and the cost thereof was a negotiated part of the fixed fee paid by the Navy. Those government agencies contracted with by defendants at their Norfolk office have offices located in the Norfolk area. Those government agencies contracted with by defendants at their Washington office have offices located in the Washington area, including the District of Columbia and contiguous areas in Maryland and Virginia. For this type of work defendants generally are paid a fixed negotiated fee.

8. A substantial portion (not less than 50 percent) of the work done by defendants and their employees in their Washington office relates to construction projects located outside the District of Columbia. A substantial portion of the work done by defendants and their employees in their Washington office is done for agencies whose offices are located outside the District of Columbia.

9. A part of the work of defendants and their employees consists of consultations with clients and prospective clients respecting architectural and engineering services and the

furnishing of advice and recommendations relative thereto, and the preparation of engineering plans and preliminary reports. For such planning and preliminary studies, defendants are paid on a fixed fee basis.

10. Frequently, but not in all instances, defendants employees prepare surveys, plans, specifications, drawings and estimates to be used by defendants' clients in soliciting contractors' bids and for the construction of the clients' projects. By contract and custom, such drawings, surveys, designs, plans and specifications remain the property of the defendants, unless the client is a Federal, State or other government agency. Plans, specifications, etc., furnished to government agencies become their property. The number of copies of such papers, plans, etc., which a private client of defendants (as distinguished from a government agency client) may desire for any purpose, such as for soliciting bids, for use of contractors and subcontractors, and for record purposes, are obtained by defendants from commercial blueprint establishments and furnished to such client at the latter's expense. Such copies of prints generally cost six or seven cents per square foot. The total cost of such copies of prints, specifications, etc. for defendants' fiscal year April 1, 1955, to March 31, 1956, was approximately \$10,500. It is the defendants' contention that such copies likewise remain defendants' property in accordance with Article 7 of the standard form of contract frequently used, copy of which is attached hereto as Appendix D. As a matter of practice, all copies of plans and specifications provided to clients and their contractors by defendants in projects which are constructed are either consumed (worn out) in the progress of the work or remain in the client's possession. They generally are not returned to the defendants, being regarded by the defendants as of little or no value after they have served their intended purpose. Copies of plans are specifications for projects which are not constructed and those copies furnished to unsuccessful bidders generally are reclaimed by defendants. At the completion of any nongovernment project a final copy of the blueprints showing all

changes approved during the course of construction is often kept by the client for his future reference and convenience in making repairs. The defendants' pay in connection with their work on behalf of such private clients usually consists of a sum equal to a fixed percentage of the cost of construction, as determined by the successful bidder.

11. After defendants' employees have made any necessary surveys not furnished by the nongovernment client (sometimes including preparation of topographical maps), they prepare plans, specifications and drawings on behalf of a client, and copies thereof, obtained as described in Item 10 above, are made available to contractors selected by the client. prospective bidders generally are required to make a deposit, ranging in amount from \$15.00 to \$100.00, for the use of and to assure return of such plans, specifications, etc. These deposits are returned to unsuccessful bidders upon return of the documents. In many instances one or more of such contractors are located outside the state or district (District of Columbia) where the plans, specifications, etc., were prepared by defendants. Where competitive bids are received, defendants usually examine and tabulate such bids to determine the lowest bidder and to make further recommendations to their client pertinent to the work. Defendants do not generally provide supervisory services in connection with government construction. For approximately fifty (50) per cent of their private clients, defendants do supervise the client's work, from an architectural and/or engineering standpoint, as a representative of the client, as such work progresses to determine whether construction is proceeding in accordance with the plans and specifications. In so doing, defendants' inspector reports to defendants any deviations from the specifications. The inspector also aids defendants in estimating the amount of labor and materials incorporated in the construction work by the contractor, for payment purposes. An additional charge is made for this service and such supervision is rendered by professionally trained employees of defendants.



12. Another part of the work of defendants' employees consists of supplying survey and field engineering services to contractors while construction work is in progress. Such survey and engineering services are performed by field men, including surveyors, transit men and chain men, generally working under supervision of a professionally trained engineer. The field men do such work as surveying boundaries, taking borings, checking sewage maps, taking measurements as construction progresses, etc. Certain of these men frequently travel from the District of Columbia to Maryland and Virginia to the site of the work and back to the defendants' office carrying with them data which are used in defendants' offices in connection with their work for clients.

A part of the work done by defendants' field men, including surveys, measurements, etc., has been in connection with construction projects such as widening streets on a naval operating base in the vicinity of the base motor pool and post exchange, extending and paving plane taxiways and parking aprons at the Naval Air Station installation at Oceana, Virginia (a Naval jet air base, part of the East Coast defense system for intercepting enemy aircraft), and replacing paving between hangars at the Naval Air Station, Norfolk, Virginia. Other such work has related to administrative buildings and machine shops located at Norfolk Navy Yard and Norfolk Naval Base, Norfolk, Virginia.

13. Since about March 1, 1956, defendants have had a private, direct telephone line between their Norfolk and Washington offices. Frequent use of this line is made in controlling, supervising and coordinating the work of the Washington office. The payroll for defendants' Washington office is made up in the Norfolk office from data prepared in the Washington office and mailed to Norfolk twice monthly. Payroll checks for Washington personnel are prepared in the Norfolk office and mailed to Washington twice monthly.

14. During every week all stenographic personnel employed by defendants, in both their Norfolk and their Washington offices, write a substantial number of letters relative to de-

fendants' business addressed to out-of-state points. In addition to writing such letters, these employees type the specifications and/or stencils for specifications referred to in the preceding paragraphs herein.

15. For the purpose of this action, the six months period from October 1, 1955 to March 31, 1956 is a representative period with reference to the type of work done by defendants and their employees.

16. This stipulation may be introduced as evidence in the case and either party may offer additional evidence not inconsistent with the stipulation.

Dated: June 4, 1956.

(S) ALAN J. HOFHEIMER,  
(S) ROBERT C. NUSBAUM,  
*Attorneys for Defendants.*

(S) JETER S. RAY,  
(S) MARVIN M. TINCHER,  
*Attorneys for Plaintiff.*

## APPENDIX A TO STIPULATION

ISSUED APRIL 27, 1958

### Amended

- 738 U. S. Navy, NOB, PWC Bldg. Z-140
- 737 Norport Homes Shopping Center
- 738 R. Lee Page, Southern States Bldg.
- 739 Strassberg Shopping Center
- 740 NRHA VA 6-11
- 741
- 742 U. S. Navy, 2nd Incr. USMC Fwd. Depot, Portsmouth, Va.
- 743 Princess Anne County, VEP R/W
- 745 Cooper A & P Store (Ocean View) Bay Front Acc
- 746 Gerber Construction Co.
- 747 U. S. Army Portable Frame Whse.
- 748 U. S. Navy, Adv. Planning, NAS, Norfolk
- 749 Crockin-Levy (Granby St.) Investigation
- 750
- 751 Great Bridge Chlorinator
- 752 Marple Estate
- 753 Cooper-Beachview Corp.
- 754 WAVY Television
- 755 Williams Paving Co. (NAAS)
- 756 Princess Anne County
- 757
- 758
- 759 V. H. Nusbaum Residence
- 760 Great American Insurance Co. (D. H. Harper)
- 761 Goodman Residence
- 762 Will T. Neff, Board of Trade Bldg.
- 763 U. S. Navy, Little Creek Theater Bldg
- 764 Little Creek Estimate (E. V. Williams)
- 765 U. S. Navy, Little Creek Repair & Painting Bldg.
- 766 Col. Roberts Office Layout—Washington



## Amended

- 767 VA 6-11—Structural
- 768 VA 6-11—Site
- 769 C. H. Spence, Church—School Alterations
- 770 Leon Banks, Medical Center (Lafayette)
- 771 W. M. Bott Post Office
- 772 Breeden & Hoffman, So. Norfolk, H. S. Accident
- 773 Hunter Scott, St. Regis Bag Plant Estimate
- 774 Army Barracks, Washington
- 775 Exchange Furniture Store
- 776 Bond Elevator Shaft
- 777 Twohy Residence
- 778 Ocean View Park Elec. Study
- 779 HRSD Winona Collection Sewers
- 780 U. S. Navy, Oceana Paving Estimate (Williams)
- 781 Calvary Baptist Church (F. J. Harmon)
- 782 U. S. Navy, Addition to Comp. Bldg. (Spec. #3435—  
Wash)
- 783 U. S. Navy, Security Fence, etc. (Spec. #43360—  
Wash)
- 784 U. S. Navy, Oceana Utility Estimate (Williams)
- 785 U. S. Navy, Adv. Planning, Coast Guard Radio Sta-  
tion
- 786 Cooper, Old Graybar Building
- 787 U. S. Marine Barracks (43446—Wash.)
- 788 Norfolk Dredging Co., Road Survey, Columbia, N. C.
- 789 U. S. Marine FWD. Depot (Rev. to 1st Incr. & Prep.  
2nd)
- 790 Dubrinsky Night Club
- 792 Delmar Trailer Park—sewage treatment
- 793 U. S. Army—Fort Lee
- 794 U. S. Army—Langley Field
- 795 U. S. Navy—Adv. Planning—3 FAETU Bldgs.
- 796 Goetz Building—Washington
- 797 Virginia, Com. of A. B. C. Store—Revision of Stand-  
ard Plans
- 798 Albano Remodeling Bldg.
- 799 Aldos Restaurant (2)

**Amended**

- 800 Russell, Chas. E.—Shopping Center
- 801 Gilpin Company—Drug Warehouse
- 802 Cooper, Dudley, Anchor Club
- 803 Paul, C. H.—East Ocean View
- 804 U. S. Navy—Advance Planning—NAMT Building
- 805 Virginia Smelting Company—Blender Building
- 806 Cooper, Dudley, Minimum Duplex
- 807 Mechanical Engineering Corp.—Transmittal Site—  
Oceana
- 808 Aglar, Charles—Housing Project
- 809 Cities Service Oil Co.—Sign Support
- 810 NIKE Bldgs. U. S. A. Corps of Engineers
- 811 Norfolk County School—Promotion
- 812 Cooper-Ocean View Amusement Park—Exhibition  
Hall
- 813 VA 6-26-9 Pile Investigation
- 814 Richmond Turnpike
- 815 Estimate for Sewage Disposal Plant—Quantico
- 816 Navy—2 FAETU Bldgs.—ASW & EMT
- 817 Culvert—Great Bridge
- 818 Navy—Potomac River Naval Comd. New Sawdust  
Collec. System
- 819 Crockin-Levy—Sign Investigation
- 820 Norfolk Dredging Co.—Prop. Line Survey—Rudee  
Heights
- 821 VA 6-8 Community House
- 822 Byrd Field—Adv. Planning Runway Extension
- 823 Crestwood School—Norfolk County School Board
- 824 Fifth Naval District—Adv. Planning (Heater) Camp  
Elmore
- 825 Webb—Borings—College of Wm. & Mary
- 826 Medical Arts—Air Cond.
- 827 Navy, PRNC—Adv. Planning—Tilghman Island, Sea  
Well
- 828 Navy, PRNC—Adv. Planning (Radiological—Decon-  
tamination)

## Amended

- 829 Navy, PRNC—Adv. Planning (Radiac. Bldg. for  
NRL)
- 830 Delmar Park Map
- 831 Cooper, Fishing Pier—Ocean View
- 832 Tourist Hotel (Bayfront) (Old Lublin Job #360)
- 833 Williams, E. V., Pinecastle AFB, Florida Estimates
- 834 Comm. of Game and Inland Fisheries—Hog Island
- 835 Langley Field Pile Test—W. W. Ford
- 836 YMCA Remodeling
- 837 U. S. Army, Fort Lee-Barracks, BOQ Dispensary,  
Motor Repairs, etc.
- 838 Appraisal of Utilities, Princess Anne County
- 839 Little Neck Point Survey
- 840 Princess Anne County, E. O. V. Sewers
- 841 Marine Corps School, Quantico, Virginia—Advance  
Planning
- 842 Yorktown Estimate—E. V. Williams
- 843 Yorktown Estimate—J. R. Houska
- 844 Proposed Office Building, Baltimore, Maryland
- 845 Carnegie Office Supply
- 846 Study of Parcel Post—Post Office
- 847 Old Dominion Turnpike Authority
- 848 Hotel for Dudley Cooper—Virginia Beach
- 849 Janaf, Inc.
- 850 Dixie Hospital
- 851 Luke Rowe's Gut, North Carolina—J. R. Houska
- 852 Janaf, Inc.—Sewage Treatment Plant
- 853 U. S. Naval Shipyard—Misc. Projects
- 854 Yorktown—W. H. Scott
- 855 Proposed Dental Offices—Leon Banks
- 856 Obendorfer Residence—Remodeling
- 857 U. S. Navy-Advance Planning—Fleet Landing, Wait-  
ing Room, etc., Little Creek
- 858 Weeksville, North Carolina—Door Engineering Com-  
pany
- 859 "Organic Rest House" Naval Powder Factor—Indian  
Head, Maryland



## Amended

- 860 Bldg.
- 861 Old Cape Henry Light House
- 862 Residence—A. J. Chewning
- 863 Rockville Shopping Center
- 864 U. S. Navy—Offices at Imperial Tobacco Company
- 865 Southern Shopping Center
- 866 Fort Meade Post Engineers Office, Budget Drawing
- 867 U. S. Army—Fort Lee—Hospital, BOQ, Chapel
- 868 P. O. L. Inspection
- 869 PRNC Patuxent Air Station
- 870 Marine Corps Schools, Quantico—100-Man Mess  
Hall and Gallery
- 871 Naval Security Station, Washington, D. C.—New  
Roof and Alterations to Boiler House, Bldg. No. 15
- 872 Charlottesville Shopping Center
- 873 ADREON Survey—Gwynn's Island
- 874 Access Road—Marine Supply Depot—W. H. Scott
- 875 Ocean View Shopping Center for Cooper
- 876 Wainwright Parking Ramp
- 877 American Oil Company—Estimate for E. V. Williams

ISSUED DECEMBER 20, 1955

## Amended

- 878 VA 6-11—Spot Borings
- 879 Oceana Auditorium Exchange for Williams & Scott
- 880 Oceana Keyport Magazine Layout for Williams &  
Scott
- 881 Oceana Hangar Paving Estimate for Williams & Scott
- 882 Beaufort, South Carolina Airfield—Estimate for W.  
H. Scott
- 883 Addition to Management Building Project VA 6-8
- 884 Oceana Fire Station—Williams & Scott Layout
- 885 OCE—Ordnance Facilities
- 885-1 OCE—Ordnance Facilities—Addendum
- 886 Walker & Laberge Co.—Condemnation Proceedings
- 887 Oceana—Shopping & Receiving Facilities—Williams  
& Scott

## Amended

- 888 Addition to Deep Creek High School
- 889 Little Ritz Drive-In Restaurant, Bethesda, Md.
- 890 Save-More Super Market
- 891 Ordnance Magazine, Fort Lee, Va.—Norfolk District Engineer—U. S. Army
- 892 Oceana—Class C Hangar Foundations—Blythe—Corner
- 892-1 Oceana—Class C Hangar—Storm Drainage—Rabette & Hite
- 893 Washington Suburban Sanitary Commission—Water & Sewer Design—Greenwood Knolls—Hyattsville, Md.
- 893-1 Washington Suburban Sanitary Commission—Water & Sewer Design—Summer & Hillcrest—Hyattsville, Md.
- 893-2 Washington Suburban Sanitary Commission—Hillcrest Estates (North Part Only)—Good Hope Hills—Glassmanor (Sec. H & L)—Hyattsville, Md.
- 893-3 Washington Suburban Sanitary Commission—Garrett Park Estates and Adelphi—Hyattsville, Md.
- 894 Building Location—Hofheimer
- 895 Janaf Shopping Center Survey
- 896 Residence for Vernon Scott—Franklin, Virginia
- 897 Warehouse & Offices—Norfolk News Agency—Norfolk, Va.
- 897-1 Norfolk News Agency—Topo Survey—Norfolk, Va.
- 898 Packing Plant—Perlin—Norfolk, Virginia
- 898-1 Packing Plant—Perlin—Topo Survey—Norfolk, Va.
- 899 Hilltop Shopping Center—Va. Beach, Va.
- 900 Norport Homes Super Market—Dr. Cooper—Norfolk, Va.
- 901 U. S. Navy—Alterations to Hangars LP4 & LP14—NAS, Norfolk
- 902 Janaf, Inc.—Subdivision Schaefer Property
- 903 U. S. Naval Shipyard—Portsmouth, Va.—Miscellaneous Projects

## Amended

- 904 U. S. Army—Norfolk District Engineer—Family Housing—Fort Lee, Va.
- 904-1 U. S. Army—Norfolk District Engineer—74 Units Family Housing—Fort Lee, Va.
- 905 Wm. P. Oberndorfer Residence—Air Conditioning—Norfolk, Virginia
- 906 Guadalcanal Area—Central Camp—MCS—Quantico, Virginia
- 907 U. S. Navy—Radiac Bldg.—Washington, D. C.
- 908 U. S. Navy—Radiological Decontamination Facilities—Washington, D. C.
- 909 Southern Shopping Center—Topo Survey—Norfolk, Va.
- 910 Goetz Building—Alternate Facility—Washington, D. C.
- 911 Williams & Scott—Road Improvements—Oceana, Virginia
- 912 Hampton Roads Sanitation District Commission—Siphon Wells and Lines—Ingleside System—Norfolk, Virginia
- 913 U. S. Navy—Potomac River Naval Command—Catapult & Arresting Gear Facilities—Patuxent River, Maryland
- 914 Norfolk County School Board—Repairs to Chlorinator—Great Bridge Elementary School—Norfolk County, Va.
- 915 U. S. Army—Norfolk District Engineer—Siting 100 Units of Capehart Housing—Fort Lee, Virginia
- 916 U. S. Army—Norfolk District Engineer—Siting 12 Units Housing—Nike Site N-59
- 917 U. S. Navy—Fifth Naval District—Relocation of Coast Guard Radio Station—Oceana, Virginia
- 918 Princess Anne County—Annexation Proceedings—Princess Anne, Va.
- 919 A & P Construction Co.—Office Building—Norfolk, Virginia



Amended

- 920 U. S. Navy—Fifth Naval District—Advance Planning Report for Moving Maintenance Shops and Offices—NSC—Norfolk, Va.
- 921 U. S. Navy—Fifth Naval District—Advance Planning Report for Pneumatic Test Facility—NAS—Norfolk, Va.
- 922 Vandeventer, Black & Meredith—Court Action on Erosion—Rudee Heights—Virginia Beach, Va.
- 923 Henry J. Kaiser Co.—Leased Space Check—Washington, D. C.
- 924 U. S. Navy—Potomac River Naval Command—Erosion Control Study—Naval Research Lab—Randle Cliff, Maryland
- 925 Dr. Dudley Cooper—Ocean Ranch Motel—Borings—Va. Beach, Va.
- 926 Dr. Dudley Cooper—Greenco Corp.—New Seaside Amusement Park—Virginia Beach, Va.
- 927 Dr. Dudley Cooper—Greenco Corp.—Prop. Line & Topo Survey—Virginia Beach, Va.
- 928 Williams & Scott—Aircraft Parking Apron—Proposed Takeoff & Layout—Oceana, Virginia
- 929 Republic of Haiti—
- 930 W. B. Schaefer, III—Prop. Survey—Raby Road to Virginia Beach Blvd., Norfolk, Va.
- 931 U. S. Army—NDE—108 Units Family Housing—1957 Pro.—Fort Lee, Va.
- 932 U. S. Army—OCE—Special AAA Facilities—Washington, D. C.
- 933 Dr. Dudley Cooper—Proposal For Post Office Sub-Station—Norfolk, Va.
- 934 Goodman-Segar-Hogan—Shopping Center—Roanoke, Virginia
- 935 Mr. & Mrs. Robert Nusbaum Residence—Princess Anne County, Va.
- 936 Williams & Scott—Parking Lot Layout—NAS, Oceana, Virginia

## Amended

- 937 Williams & Scott—Overpass Takeoff & Field Engr.—  
Little Creek, Va.
- 938 Dr. Dudley Cooper—Neighborhood Shopping Cen-  
ter—Norfolk County, Va.
- 939 Washington Suburban Sanitary Commission—Water  
& Sewage Design
- a. Parkway & Glenhaven Subdivision
  - b. Phelps's Edition to North Forestville

ISSUED FEBRUARY 28, 1956

## Amended

- 939-1 Washington Suburban Sanitary Commission—Water  
& Sewer Design—Moreland Gardens Subdivision—  
Holly Park
- 939-2 Washington Suburban Sanitary Commission—Water  
& Sewer Design—District Heights, Prince Georges  
County, Md.
- 939-3 Washington Suburban Sanitary Commission—Water  
Design—Farmer Drive & Brinkley Road, Part I
- 939-4 Washington Suburban Sanitary Commission—Sewer  
Design—New Hampshire Ave. & Outfall Sewer,  
Part I
- 939-5 Washington Suburban Sanitary Commission—Water  
& Sewer Design—Bradmoor Subdivision, Parts I  
& II
- 939-6 Washington Suburban Sanitary Commission—Water  
& Sewer Design—Kenwood Park
- 939-7 Washington Suburban Sanitary Commission—Water  
& Sewer Design—Merrimac Park
- 939-8 Washington Suburban Sanitary Commission—Water  
& Sewer Design—Riverdale Hills
- 939-9 Washington Suburban Sanitary Commission—Water  
& Sewer Design—Oakview & Knob Hill Subdivi-  
sion, Part I, II & Cul-De-Sac
- 939-10 Washington Suburban Sanitary Commission—Water  
& Sewer Design—Miller Estates, Section II

## Amended

- 939-11 Washington Suburban Sanitary Commission—Water Design—Knott's Addition to Beltsville Heights
- 939-12 Washington Suburban Sanitary Commission—Water & Sewer Design—Woodside Forest
- 939-13 Washington Suburban Sanitary Commission—Water & Sewer Design—Franklin Park, Section III & IV
- 939-14 Washington Suburban Sanitary Commission—Water & Sewer Design—Cool Spring Village
- 939-15 Washington Suburban Sanitary Commission—Water Design—Landover Road adjacent to Palmer Park
- 939-16 Washington Suburban Sanitary Commission—Water & Sewer Design—Marlowe Heights
- 939-17 Washington Suburban Sanitary Commission—Water & Sewer Design—Ritchie Heights, Part II
- 939-18 Washington Suburban Sanitary Commission—Water & Sewer Design—Hillcrest Heights, Section VI, Part II-A
- 939-19 Washington Suburban Sanitary Commission—Water & Sewer Design—Carrollton
- 939-20 Washington Suburban Sanitary Commission—Water Design—Holly Tree Road, Hidden Village
- 939-21 Washington Suburban Sanitary Commission—Water & Sewer Design—Aspen Knolls
- 939-22 Washington Suburban Sanitary Commission—Water & Sewer Design—Kay Park
- 939-23 Washington Suburban Sanitary Commission—Water & Sewer Design—Greenwood Knolls, Section VII
- 939-24 Washington Suburban Sanitary Commission—Water & Sewer Design—Byeford Subdivision

ISSUED APRIL 27, 1956

## Amended

- 940 Williams & Scott—Baseball Diamond Layout—NAS—Oceana, Va.
- 941 Williams & Scott —Takeoff & Layout—NAS—Norfolk, Va.



## Amended

- 942 U. S. Army—Norfolk District Engineer—Chapel—Fort Lee, Va.
- 943 U. S. Army—JCA—Southern District—Milano, Italy.
- 944 W. H. Scott—Takeoff Access Road—Roanoke Rapids, N. C.
- 945 U. S. Army—NDE—Barracks—1956 Program—Fort Lee, Va. (Second Increment J. O. 837)
- 946 U. S. Navy—5ND—Alterations to Bldg. 3015—Amphib Base—Little Creek, Va.
- 947 U. S. Army—OCE—Army Aviation Facilities—Washington, D. C.
- 948 U. S. Navy—5ND—Repairs to 10 Bldgs.—USNSY—Portsmouth, Va.
- 949 U. S. Army—NDE—400 Units Capehart Family Housing—Fort Lee, Va.
- 950 U. S. Navy—PRNC—Plans & Specifications for 100 Man Mess & Galley—MCS—Quantico, Va.
- 951 Williams & Scott—Takeoff & Layout—MCAS—Cherry Point, N. C.
- 952 U. S. Navy—5ND—Repairs to Buildings—USNSY—Portsmouth, Va.
- 953 Norfolk Dredging Co.—Bulkhead and Spillway Design—Fiddlers Creek, Warwick, Va.
- 954 Tidewater Steel Co.—Design Bar Joists—Norfolk, Va.
- 955 U. S. Army—NDE—25 Units Capehart Family Housing—Richmond QM Depot (Bellwood)
- 956 Hampton Roads Sanitation District Commission—Court Action—(Tysinger Case)—Norfolk, Va.
- 957 Joseph Ottenstein—Remodeling & Air Conditioning of Residence—Bird Neck Point, Virginia Beach, Va.
- 958 Sam Miller—Drafting Work on Bathhouse—Princess Anne County, Va.
- 959 J. Parker—Bus Terminal Restaurants, Inc.—Newsstand Sketch—Norfolk, Va.

Amended

- 960 Norfolk Contracting Co. & Jack Kitchen—Shopping  
Center Study—Indian River Road, Norfolk, Va.
- 961 Seaboard Citizens National Bank—Interior Remodel-  
ing—Main Office—Norfolk, Va.
- 962 James Tyler—Engineering Report on Old Law  
Building—Norfolk, Va.
- 963 U. S. Navy—PRNC—Plans & Specifications for Re-  
pairs to Hangars, Bldgs. 29, 47 & 54—USNAS—  
Washington, D. C.
- 964 H. Cashvan & M. Simon—Preliminary Plans for  
Shopping Center—Indian River Road—Norfolk,  
Va.
- 965 E. V. Williams Co.—Takeoff Grading & Storm Dr.—  
Pier 12—NOB—Norfolk, Va.
- 966 United Artist Corp.—Study for Alteration—Wash-  
ington, D. C.
- 967 Chesterfield County, Va.—Expert Testimony—An-  
nexation Case—Chesterfield C. H., Va.
- 968 Murrer Chemical Co.—Test Borings—Portsmouth,  
Va.
- 969 Vanguard Construction Co.—Layout Foundations—  
Southern Shopping Center—Norfolk, Va.

**EXTRACT FROM TRANSCRIPT OF THE TESTIMONY**

**In the District Court of the United States for the Eastern  
District of Virginia, Norfolk Division**

**C/A No. 2070.**

**JAMES P. MITCHELL, SECRETARY OF LABOR, U. S. DEPARTMENT  
OF LABOR, PLAINTIFF**

**v.**

**LUBLIN, MCGAUGHY AND ASSOCIATES, A COPARTNERSHIP, AND  
ALFRED M. LUBLIN, JOHN B. MCGAUGHY, WILLIAM T. Mc-  
MILLIAN AND WILLIAM MARSHALL, JR., INDIVIDUALLY AND  
DOING BUSINESS AS LUBLIN, MCGAUGHY AND ASSOCIATES,  
DEFENDANTS**

**TRANSCRIPT OF TESTIMONY**

A hearing was held in this matter on the 6th day of June 1956, in the United States Courtroom at Norfolk, Virginia, with Honorable Walter E. Hoffman, United States District Judge, Presiding.

Appearances: Jeter S. Ray, Esq., Regional Attorney, Department of Labor, Marvin M. Tinchler, Esq., Attorney, Department of Labor, John M. Hollis, Esq., Assistant United States Attorney for Plaintiff, Alan J. Hofheimer, Esq., Robert C. Nusbaum, Esq., for Defendants.

Mr. HOLLIS. If your Honor please, I would like to present to the Court at this time Mr. Jeter S. Ray, Regional Attorney for the Department of Labor, and Mr. Marvin Tinchler who is also an attorney for the Department of Labor, both from Nashville, Tennessee, who will handle this case on behalf of the Government.

The COURT. Very happy to have you gentlemen in the case with us.

\* Numbers refer to pages in original typed transcript of testimony.



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Mr. TINCER. Thank you, your Honor.

The COURT. Would either of you like to make an opening statement, or would you prefer letting it proceed as the evidence may develop?

Mr. TINCER. If your Honor please, I think it might be helpful to simply state in a general way the nature of the case and then to present the stipulation which has been agreed to.

This is an action, if the Court please, brought by the Secretary of Labor, to enjoin the firm of Lublin, McGaughy and Associates, and the individual partners from violating the overtime and record-keeping provisions of the Fair Labor Standards Act, based upon an allegation that employees of the firm and the defendants are actively engaged in producing goods for interstate commerce as well as engaging in interstate commerce themselves. The answer of the defendant denies that the violations have occurred, principally upon the theory that the Act does not apply with regard to the employees as to whom violations have been alleged.

Now, the stipulation has narrowed the issues, as we view them, and has set out a number of the pertinent facts in regard to the case and we are prepared at this time to offer the stipulation which has been signed by counsel in evidence. And then if the Court desires, I can read the stipulation.

The COURT. I think it would be of some help, Mr. Tincer, under the circumstances, or you can hand it up to me and let me read it.

Mr. TINCER. Perhaps it might be well if we read it along together, your Honor.

The COURT. Let it be marked filed.

(The stipulation was then read by Mr. Tincer.)

The COURT. I do not find attached to this stipulation the various appendices that you have mentioned.

Mr. TINCER. That is correct, your Honor. We had a little mechanical problem about attaching them. I have those appendices here which have been marked and I will present them at this time.

Appendix A to the stipulation is the job list.

The COURT. Let it be filed.

Mr. TINCHER. I have just now obtained from defendant's counsel the original copy of Appendix B. That is Appendix B to the stipulation.

The COURT. Those were the only two appendices, is that correct?

Mr. TINCHER. I have two more, if your Honor please. Appendix C is in two parts, the roll of blueprints here would be Part 1 of Appendix C. That has been marked as Appendix C. Bound volume of specifications will be Part 2 of Appendix C.

This form of agreement is Appendix D to the stipulation.

Now, if the Court please, we have some information which has been furnished to us by the District Engineers of Norfolk and by the Public Works Officer of the Fifth Naval District which I understand can be read into the record as testimony which these people would give if called. If Mr. Hofheimer has any comments to make before I read these, I would like for him to go ahead.

Mr. HOFHEIMER. This is my comment to this, your Honor: We have no objection to the form of this evidence. We will admit this just as readily as we would admit the man testifying to it were he present. We do object to the relevancy of the thing. We don't think that the Army's testimony as to what they do with the plans after we turn them over to them has anything to do with our being engaged in interstate commerce or the production of goods for interstate commerce. On that ground of the relevancy of the testimony, not as to the form of its presentation, we object to its admission.

The COURT. Well, of course, I doubt if I could pass on that at the present time, Mr. Hofheimer. I think the best thing to do, to let those particular letters be introduced in evidence as plaintiff's exhibits, with the understanding that they will be subject to further ruling of the Court. Your objection, of course, going to the relevancy but not to the form. In other words, you are perfectly willing that if the gentleman from the Army or District Engineer's office were here, he would testify, "This is what we do with these plans."

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Mr. HOFHEIMER. Yes, sir; exactly.

The COURT. But you say it doesn't make any difference because that wouldn't have any bearing on the final decision in the case.

Let the exhibits then that you have reference to, Mr. Tincher, be marked as "Plaintiff's Exhibits 1, 2, and so on," all of which will be subject to further ruling of the Court as to its relevancy.

Mr. TINCHER. Thank you, your Honor.

Exhibit No. 1 is the letter addressed to Mr. Marvin M. Tincher, Attorney, U. S. Department of Labor, et cetera, by W. Sihler, Rear Admiral, CEC, USN, District Public Works Officer, dated 31 May 1956.

6 These letters are short, your Honor. I would like to read them into the record, if that is all right with the Court.

The COURT. You wish the court reporter to take them down in view of the fact they are exhibits?

Mr. TINCHER. No; that won't be necessary.

(Letter was then read by Mr. Tincher.)

("Marked Plaintiff's Exhibit No. 1.")

Mr. HOFHEIMER. Is this a part of the stipulation? I mean, are you introducing this as a part of the stipulation?

Mr. TINCHER. No, sir. It is part of the evidence.

Mr. HOFHEIMER. It seems to me if we are going to make an opening statement it should precede the introduction of this letter.

The COURT. I think perhaps you are correct, Mr. Hofheimer. In other words, the defendant's stipulation was read. However, I don't think it makes too much difference unless you have some particular objection.

Mr. HOFHEIMER. No, sir; just the nature of things, it seemed to me we were going into the evidence of the case.

The COURT. I suppose what Mr. Tincher desired to do was to put in certain documentary evidence before we started listening to any witnesses.

7 Mr. TINCHER. That is correct, if your Honor please. And we have no desire to make any opening statement, other than what has already been made.



The COURT. Go ahead and you can read those letters into the record.

Mr. TINCER. As Plaintiff's Exhibit No. 2, letter addressed to Mr. John M. Hollis, Assistant United States Attorney, by Willis T. Ellis, Lieutenant Colonel, Corps of Engineers, dated 29 May 1956.

(Letter was then read by Tincer.)

("Marked Plaintiff's Exhibit No. 2.")

Mr. TINCER. And as Plaintiff's Exhibit No. 3, a letter to Mr. John M. Hollis, Assistant United States Attorney, signed by Willis T. Ellis and dated 5 June 1956.

Mr. HOFHEIMER. Your Honor please, for the purpose of the record, inasmuch as this witness is not here to be cross-examined and of course we make no point of that, I think Mr. Tincer will agree that all the shipments of those blueprints and specifications—I don't think it is real clear in the letter—all those shipments and transportation of them was done by the Army itself; is that correct?

Mr. TINCER. That is correct.

Mr. HOFHEIMER. And the Navy. One by the Army and one by the Navy.

Mr. TINCER. We agree with that with this explanation, which I think Mr. Hofheimer will agree, that the defendants knew that in the normal course of events these copies of plans and specifications would be sent to the divisional offices or to the Department of the Navy in Washington, D. C., for approval and for filing and so forth as set out in the letters.

The COURT. I don't know whether they knew it or not.

Mr. HOFHEIMER. No, we don't. Prior to these letters we had no information one way or the other on that.

Mr. TINCER. We expect to be able to show that.

(Letter marked "Plaintiff's Exhibit No. 3" was then read by Mr. Tincer.)

The COURT. As I read the stipulation, gentlemen, I think the issue is very narrow. It narrows itself down to a point of law. I am generally familiar with the nature of work performed by

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architects and consulting engineers. I had some experience in connection with the construction of the Elizabeth River Tunnel project, on which the firm of Parsons, Brinkerhof, Hall, and McDonald performed similar services to what these gentlemen did. I think it would be identical for all practical purposes except that was on that one project alone. I am confident you gentlemen are probably familiar with the firm. So I think I know what the situation is. I think it is going to narrow itself down to purely a legal point. However, I don't want to foreclose anyone from putting on any evidence they have. But I just want to say to you, I have no doubt, Mr. McGaughy travels to New York or Chicago or anywhere they think they have got a good job to pick up and they are off. I have no doubt about that. If they testify to the contrary, I would look with some suspicions on their testimony. I am confident that they are on the go consistently. And that is true, I daresay, with every consulting engineer, because a consulting engineer can't perform—he can do his architectural work maybe in his home office, but he has got to go in the field and be there and in order to get that business you have to go away from your local base. There is no question about that.

All right, Mr. Tincher, whatever evidence you think now may be pertinent, if you care to put it on.

13

JOHN B. MCGAUGHY, sworn.

Direct examination by Mr. TINCHER:

Q. Will you state your name, please, sir.

A. John B. McGaughy.

Q. Are you a defendant in this action?

A. Yes.

Q. What is your connection with the firm of Lublin, McGaughy and Associates?

A. I am a partner.

Q. One of the senior partners?

A. That is correct.

Q. Mr. McGaughy, the work of the firm has been described generally in the stipulation and that sets out that you have two

offices, one in Norfolk and one in Washington, and then certain related interests in France and Italy. Is that correct?

A. Yes.

Q. What classes of employees does your firm employ in the Norfolk office?

A. We have what we would term architects, engineers, draftsmen, secretarial help, and office manager.

Q. Now, as you know, there is no issue in the case with regard to your architects and engineers. I believe you consider those as professional people, do you not?

14

A. That is right.

Q. Would you describe then the work of the draftsmen employed by your company?

A. It would be very difficult to do accurately because, in the first place, as I have explained before to you in our conversations, each project is somewhat different. What they might be working on today can be entirely different from what they can be working on tomorrow or even next week. But basically they are putting down ideas and thoughts on paper and in some cases they help develop the criteria, depending upon what their particular qualifications, how far advanced they are, whether they are what we would term a subprofessional or professional employee. Some of them just do completely routine work, some of them do actual design work as well as drafting.

Q. When they do any design work is that work reviewed by one of the professional employees?

A. All work is finally reviewed by professional employees as well as partners. In our case, we are personally responsible legally for everything that we do and it must be reviewed by a partner. We can't afford to do otherwise.

Q. Would it be correct to say generally speaking draftsmen are carrying out the work of putting down on paper the lines and dimensions and mechanical data with reference to a project that your firm might be working on?

15

A. In some cases that is true. In other cases that is not true. Sometimes a draftsman is given the opportunity or



chance to develop a certain phase of the work himself, depending upon what his particular qualifications are, how well qualified he is, his background and experience.

Q. Generally speaking, though, they are doing what they are told to do in putting down on paper the drawings which they prepare, aren't they?

A. If you are talking about just a straight out and out draftsman, we don't consider—we consider more or less a tracer type, yes. But we have quite a few what we would normally term design draftsmen. They do more than that.

Q. You do have some of these tracer type draftsmen?

A. Yes.

Q. What is the work of your field men, Mr. McGaughy?

A. Field men can be broken down in certain classifications, generally very general classification. We have, for instance, if we have a survey party, you have what we call an instrument man and/or a chief of party who is in charge of operation, running that particular group. In addition he has certain people who work with him, such as we call chainmen and rodmen. They are doing basically work that is involved in measuring something. That is what it amounts to in so many words. They are carrying out the orders of the instrument man or chief of parties.

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Q. They go out and make measurements and conduct test borings and gather data to be used in the plans and specifications which your company prepares, is that right?

A. That is correct.

Q. Then your stenographers, what type of work do they do, Mr. McGaughy?

A. They obviously write letters, and specifications, and whatever else is required of them in carrying out the business, such as memorandums and so forth, filing, and just general office work that you find in any office.

Q. That is their principal occupation then, what they are paid to do?

A. That is right.

Q. Do you have the same classes of employees in your Washington office?

A. Washington office is very similar to the Norfolk office in its overall concepts. The major differences, the book-keeping end of the work is centralized here in Norfolk and all the records are kept here.

Q. But the work of your field men and of your draftsmen in Washington would be similar to that in the Norfolk office?

A. Very similar to that.

Q. Now, Mr. McGaughy, it is stipulated that approximately 60 per cent of your firm's work in the Norfolk office is for the Army and Navy; and that approximately 85 per cent at the Washington office is for the Army and Navy and municipal government subdivisions; is that correct?

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A. Well, it's a very approximate figure. We have never tried to analyze it carefully. We think those percentages are representative, however, in the case.

Q. Now, is it true that a considerable portion of the work which your firm does for the Army, for example, consists of site adaptation of standard plans that are furnished to you by the Army and the Navy? We'll confine this to the Army at the present time.

A. In some cases, in many cases it's a matter of taking a set of plans where you have to completely redesign the foundation, redesign the site work and modify certain work to make them usable in a certain area.

Q. But your answer is that a considerable portion of your work consists of taking standard plans which the Army already has and adapting those to a particular type of structure at a specific location?

A. I would assume that is somewhere near correct, yes.

Q. From your knowledge of the business, you can tell the Court whether that is?

A. You are using a term that is very difficult to pin down. I admit freely we do some of that work; what percentage of it is, I don't know.

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Q. For example, the Fort Lee housing project is that type of work, is it not?

A. That is correct.

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Q. And there is also a similar project at the Quartermaster Depot in Richmond, Virginia, is there not?

A. That is right.

Q. Would the same thing be true for work which you do for the Navy Department?

A. No.

Q. I will ask you whether the project at Quantico, Virginia, is of that type.

A. No, it is not.

Q. That does not involve adapting any plans that are furnished to you by the Navy Department?

A. No; it does not.

Q. In the situation where you take standard plans which the Army has, do you know or can you tell from such plans where they have originated?

A. Yes.

Q. In connection with the Fort Lee project, do you recall the architectural firm that originated the plans there?

A. No; I don't. I know it was an out of State firm, however.

19 Q. Some firm located somewhere outside of the State of Virginia?

A. That is correct. I don't remember the name.

Q. Did the specifications that accompanied those plans also originate with that out of State firm?

A. The best of my knowledge, no specifications accompanied those plans.

Q. Could you tell the Court why the Department of the Army would use those standard plans in connection with the Fort Lee housing project rather than to have your firm start from the beginning to design plans for that project?

A. Basically, it seems to be a policy of the Corps of Engineers to adopt certain standards which are used in large areas of our country, and have a set of plans prepared that meet those particular standards.

Q. Go ahead and complete your answer.

A. These standards are developed and they cover the gen-



eral usage and then the standards are modified to meet local conditions which always change the standards, so to speak.

Q. Could you say whether it is cheaper for the Department of the Army to have your firm adapt those standard plans at Fort Lee than it would be to start from the beginning and design the project yourselves?

A. Well, that is a point of view you get a lot of argument about. The armed services themselves don't agree on it and I certainly wouldn't want to put myself in the middle of that argument. But frankly I think it's wide open to question. I don't think anyone can prove either way.

Q. Maybe we can get at it this way: Would your firm have set a higher figure as charge for designing the project at Fort Lee, Virginia, if you had started from the beginning than you agreed upon for adapting plans already in the possession of the Army?

A. I think it's obvious that if we do less work our fee is bound to be less. On the other hand, when you want to consider what costs the client which in this case is the Government, you have to consider not only the professional fees but but also the construction fees. Most people contend you use a set of standard plans that are not basically adapted, designed for a particular site to use, they end up costing you more, but there is some argument on both sides. So you can't just separate one little phase of it from the entire picture. You don't get a true picture at all.

Q. Couldn't you tell the Court whether or not your fee would have been larger in this case if you had?

A. I said it would have been.

Q. How much larger would you estimate that it would have been?

A. I don't think that has any particular bearing on this case and I am not prepared to answer the question.

Mr. NUSBAUM. I object to the question.

The COURT. Objection sustained. He has testified it would have been larger. We are not going to go into each particular project and require Mr. McGaughy to sit down and analyze what it would amount to.

Mr. NUSBAUM. I believe Mr. McGaughy's testimony, it would take several days to prepare.

The COURT. He has answered "larger." I think that is enough.

By Mr. TINCER:

Q. The standard plans which your firm has worked from on the Fort Lee project were the property of the Department of the Army, I assume; is that right?

A. That is correct.

Q. Has your firm ever prepared any plans and specifications for the Army which became standard plans?

A. Yes, we have.

Q. Was one of those sets in connection with portable frame warehouses that you designed for the Army?

A. Yes.

Q. And when that set of plans was completed it became the property of the Department of the Army, did it not?

A. That is right.

Q. What did that set of plans relate to? What type of structure and how large and what was the approximate value of constructing that type of property?

A. That particular set of plans related to a warehouse which would be demountable, which could be taken down and moved. It was composed of 1 to 18 units, each unit being more or less multiple and could be built to various sizes up to 18 units, and each unit would cost approximately \$80,000. So 18 units would cost roughly \$80,000 times 18, which I think would be one million and a half.

Q. Something over a million dollars?

A. I think so.

Q. That was designed to be used and adopted to site locations all around the world, was it not?

A. I would say in the United States. I don't know beyond the United States of any plans for its use frankly.

By the COURT:

Q. When you prepared that set of plans for the demountable warehouse, Mr. McGaughy, were you called upon to pre-

pare the plans under the thought that they would be adopted as standard plans for the Army, or were you called upon to prepare plans for a demountable warehouse, which of course after you submitted the plans then they were adopted by the Army as standard plans?

A. No. This is what they would call a set of standard plans to use anywhere, with site modifications or changes that they would like to use it anywhere they would want to.

By Mr. TINCHER:

Q. Outside Virginia as well as in Virginia, is that right?

A. Yes, sir. Incidentally, as far as I know they have never used it, however. They have never used those particular plans to date.

Q. That is your present knowledge; can you state whether or not they have been used?

A. I am sure they haven't unless the Office, Chief of Engineers, has misinformed me. But I am reasonably confident they have not been used to date.

Q. They can be expected to use them when they have that type of warehouse to be built?

A. If they have that particular need then they will use them; yes.

Q. I believe your firm has designed a fleet electronic training facility for the Navy Department recently, is that right?

A. Yes; that is right.

Q. Is that job No. S-816 and 860 on the appendix to the stipulation?

A. I can't truthfully say. I don't recall but I assume those numbers are correct. We did do the job.

Q. Do you recall how much you were paid by the Navy Department for that particular job?

Mr. HOFHEIMER. If your Honor please, we object to that on the same grounds as the other.

The COURT. What is the purpose of it, Mr. Tinchler?

Mr. TINCHER. Some measure of the value, if your Honor please, of the set of plans and specifications furnished in that case.



The COURT. Well, doesn't your stipulation substantially cover that? There is no contention on the part of the defendants that they do not prepare drawings, plans, specifications and estimates in connection with construction work which is performed outside of Virginia. And I assume that they are perfectly willing to concede that dollars and centswise it would be substantial. Now, I don't think that it is necessary to go into it. Furthermore, I don't think that Mr. McGaughy would know unless he had an exceptional memory or particularly remembered one particular project. He hasn't got his records here. At least if he has, I don't see the need of going into it. After all, this newspaper reporter around here—but what business is it of the public what Lublin, McGaughy does dollarwise? The sole question here is, are they within the Act? I can agree to this extent: I recall one time on a National Labor Relations Board case, which is not identical of course with the Fair Labor Standards Act but many of the principles are somewhat applicable, I had a case involving a construction firm here in town when I was practicing law, and dollarwise the goods purchased by that construction firm was less than 5 per cent from out of State clients.. And the Labor Board held with me on that, that they were not within the Act, because it was such a de minimus amount. But I don't believe that is the contention in this case, is it, Mr. Hofheimer?

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Mr. HOFHEIMER. No, sir.

Mr. TINCER. I believe if Mr. Hofheimer will agree it was a substantial fee, that will be sufficient.

The COURT. Substantial dollar and centswise.

Mr. HOFHEIMER. Any fee the Army and Navy pays the chances are is a substantial fee.

(By Mr. TINCER):

Q. Did the plans and specifications for that job become the property of the Department of Navy, Mr. McGaughy?

A. Yes.

Q. I have here for illustration purposes a set of specifications. Will you look at these and see if this set of specifications related to that job?

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A. Yes; they do.

Q. Was that the project on which your firm furnished the Navy with 200 copies of this set of specifications?

A. I imagine so. I don't recall the exact contract stipulations. Sometimes they require 200 sets, whenever they require it we furnish it. That is all.

Mr. TINCER. Can it be agreed that this is the set of specifications referred to in which 200 copies were furnished?

Mr. HOFHEIMER. If they were. This is the one instance, specification of which the Navy had printed up; at least it was printed up at the expense of the Navy, 200 copies of specifications, that is correct.

Mr. TINCER. I would like to offer as Plaintiff's Exhibit No. 4 this set of specifications which the witness has described and which counsel agrees is the project referred to in the stipulation.

The COURT. I believe that reference is in paragraph 7 of the stipulation, job No. 860.

("Marked Plaintiff's Exhibit No. 4.")

(By Mr. TINCER):

Q. Mr. McGaughy, do you participate in the negotiations with the Army and Navy officials with regard to jobs that your firm does for them?

A. Yes.

Q. Are you acquainted with the way in which they send out notices to prospective bidders when they have some construction work to be let out on bids?

A. No. It's basically no concern of ours.

Q. You have been dealing with them over a period of several years, have you not?

A. Yes.

Q. And aren't you familiar with the fact that they have a large mailing list of contractors to whom they send out notices in regard to various construction projects?

A. I assume they might have, but I have no knowledge first-hand that they do.

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Q. Without first-hand knowledge, your acquaintance with the way in which they let out bids is such that you know that is done, is it not?

A. I am not sure it's done; no.

Q. And also that they have large lists of suppliers to whom they send out specifications in connection with a construction project?

A. I have no knowledge of that.

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Q. In any event, when your firm prepares drawings and specifications for the Army or the Navy, those drawings and specifications are sent to prospective bidders wherever they may be located?

A. I assume they are.

Q. That is the way it is done, is it not?

A. You are asking me to tell you. You have introduced a lot of how the Army runs its business. Our project is to deliver the plans and specifications to the District Engineer, active. It ceases at that point. I don't think I should have to testify what they do with them. I don't know. Basically, I have an idea.

Q. You have a reason to believe that is the way?

A. I would assume they would. Although I wouldn't be sure they do.

Q. Without being sure, isn't your experience with them and with the letting of bids generally such that you have reason to expect those plans and specifications to be sent out to prospective bidders in areas adjacent to the states in which the project is to be erected?

A. I think I agreed to that in the stipulation.

Q. And when you furnish plans and specifications to the Army and the Navy, you do that with the expectation that they will send out prints and copies of those—

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Mr. HOFHEIMER. Excuse me one minute. Now, if your Honor please, I object to that. He has testified over and over again that he assumed they did. He did not know it as a matter of fact. I can't see any reason to badger him with trying to make him say he knows they are going to do it. In some instances they probably don't do; where they don't ever build



such a project, such as the thing he mentioned earlier. He said what he knows about it. I think counsel is laboring the point.

The COURT. Let me ask this question:

By the COURT:

Q. Mr. McGaughy, after having submitted your plans and specifications to either the Army or the Navy, did you ever thereafter receive inquiries from some out of State contractor asking for more specific information to clarify anything that might be in the plans and specifications?

A. With the Government agencies—I am not going to say it has never happened but it's a very rare thing—they like everything to be channeled back through them. Most people who bid government work know that and they always go through the department channels. We have had request for clarification on certain points from the using agency, the Army or the Navy, as the case may be, and we assume that is based on some question from a contractor, although we have no really firsthand knowledge.

The COURT. I think Mr. McGaughy has sufficiently answered the question. And the way the Court interprets it is this: That when Mr. McGaughy and his firm send the plans and specifications to the Army or Navy, as the case may be, that they have general knowledge that if the work is constructed, the project is carried through to consummation, that out of State bidders are going to bid on it and plans and specifications are going to be sent out of the State. They don't know on any specific project because anybody dealing with the Government knows the Government can change their mind overnight and they may abandon it. They may defer it and when it gets deferred and put in file 13 it may amount to abandonment with them. But whatever the situation may be, I think that Mr. McGaughy has stated that from his general knowledge that in many, many cases he realizes that the plans and specifications are sent out of the State. Now, that is in substance?

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The WITNESS. That is correct, sir. And I think we stipulated that.

By Mr. TINCER:

Q. Mr. McGaughy, from the stipulation which has been filed it appears to me that your firm more or less specializes in military governmental institutional type architecture and engineering. Is that correct?

31 A. I wouldn't say that is correct; no, sir. That depends entirely upon the economy as of the moment. At this particular time, in this particular area the government economy has a great deal to do with anything. There has been times we have had not a single government job in the office for a long period of time. Then our business is then obviously based on private concerns. We open our office to take care of clients, whoever they may be, we don't care; as long as they are substantial people and we can enter a profitable type of professional relationship with them, we can render them a service.

Q. Would it be correct to say that at the present and in recent years most of your business has been with relation to military institutional, government, commercial and industrial type structures as distinguished from private residences, for example?

A. That is correct.

Q. That type of structure is generally a fairly large and intricate in its design and construction, is it not?

A. Yes.

Q. How important, Mr. McGaughy, is the work of your draftsmen in their preparation of the plans and specifications for such buildings?

32 A. Well, I think it goes without saying, if we didn't have draftsmen to put the ideas down we couldn't do the work we now do. The architectural engineering profession as we know it today is geared up to the point where you have to have certain people do certain phases of the work and each one is a very important cog in the overall picture.

Q. As a practical matter, the type of building that your plans and specifications relate to could not be built without the

drawings and plans that are prepared by your draftsmen, is that right?

A. That is my personal opinion. But you can find a lot of people that will disagree with it.

Q. You would state that in your opinion that is correct, would you not?

A. I would say it certainly is a preferable way.

Q. When you have completed the plans and specifications for your client—I believe in the terminology of your profession he is known as the owner, is that correct?

A. Yes; that is right.

Q. And when you have completed the plans and specifications for the owner, he then normally takes those to a contractor after a contractor has been chosen and tells the contractor to proceed and build the structure which those plans and specifications relate to; is that the normal procedure?

A. Basically that is somewhat near correct. I mean there are certain steps you missed in the process, but I don't think it adds any importance frankly.

Q. In some instances the owner will engage you or your firm to see that the contractor follows those plans and specifications in erecting the structure?

33

A. That is correct.

Q. I believe in regard to the private owners that you represent, in approximately 50 per cent of the cases your firm is engaged to do such supervision?

A. Yes.

Q. Then the work of your employees in preparing these plans and specifications becomes a part of that structure, as it is built and after it is completed, isn't that right?

A. I don't think so.

Q. Isn't the drawing which your draftsman prepares as much a part of the building as the work of the bricklayer who puts the bricks in place?

Mr. NUSBAUM. I object to that, your Honor.

The COURT. Isn't that a legal conclusion, Mr. Tincher?

Mr. TINCHER. It really doesn't appear to me, your Honor, as



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being a legal issue in the case. I think it's a factual matter which would have an important bearing on the issue.

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The COURT. They don't put the plans and specifications as such into the building, unless they have a corner-stone laid and they might put it in there then. As I see it, it is a purely legal conclusion.

I don't want to expedite this matter, but I am going to tell you very frankly I could start hearing the argument on the law right now. I don't know anything about Mr. McGaughy's business and his firm personally. But there is no issue here except the legal issue. There are one or two points I think brought out so far. But that question you asked him is the very feature that you are asking me to decide, aren't you?

Mr. TINCHER. It relates very closely to it, your Honor.

The COURT. Then he ought to take my job and I ought to take his job.

Mr. TINCHER. I certainly am trying to avoid invading the province of the Court here.

The COURT. I think that is a legal conclusion. I sustain the objection.

By Mr. TINCHER:

Q. Let me ask this question, Mr. McGaughy: In the construction of the building which has been designed and for which plans have been prepared in your office, the bricklayer will follow the drawings that have been made by your draftsmen, will he not?

35

A. You are using terms there that I don't think you can apply like you want to apply them. First place, the bricklayer, average bricklayer, doesn't know how to read plans. The contractor follows the plans probably and makes use of them. But the bricklayer is told what to do. Most bricklayers don't read plans.

Q. What the bricklayer does is perhaps following someone's directions but it is done pursuant to drawings that are involved in the plans, is it not?

A. The drawings are the bases of the contract and obviously

the contractor is trying to carry out a contractual agreement, so I would assume they are trying to follow the plans.

Q. Let me ask you this: How does the plumber, for example, or his supervisor, know where to run his lines in the building?

A. Well, I can answer that in a lot of ways. But he first has a set of plans to tell him what he has to accomplish in that. Second, he has a plumbing inspector; no matter what you might think, he is going to disagree with you probably. He has any number of agencies telling him where and what is to be done, plus the plans naturally. Basically, we intend the plans should be followed. That is the reason the owner had them prepared.

Q. And your draftsman is telling the plumber where the lines are to run?

A. No; he is not.

Q. Isn't that what his drawings show and convey on the plan?

A. I think that is just like you are trying to say that when the secretary of a lawyer types a brief that his secretary is telling him what to do. It's not true. Professional people are responsible for those plans, are telling them maybe where they want that work accomplished, but certainly not the draftsmen.

Q. It is the work of the draftsmen that shows up in the final plans?

A. The draftsman is putting down the ideas of the designer, conveying them so that the layman might be able to follow them.

Q. He puts them down on the plans in lines and figures, does he not?

A. In some cases, he is putting lines and figures. He is actually drawing. Obviously he is putting something down there.

Q. And the plumber, for example, follows those lines and figures in putting in the plumbing lines?

A. I think that is somewhat true.

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Q. Is there anything in it that is not true?

A. Yes.

Q. Would you go ahead and explain then.

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A. In the first place, when you get the plumbing plans and heating plans and plans of that nature, they are diagrammatic. They call for—they have to be modified according to the specifications; and, for instance, you put any certain unit which all of us have seen that maybe the piping comes in at one point on the left-hand side, equivalent unit just as good the piping comes in on the right-hand side. So obviously the plumber doesn't follow the plans to the letter. They have to be diagrammatic; otherwise, they would never get anything done. Otherwise, you would have to use only one supplier's products all of the time and anyone who works with the Government knows that is prohibited. So the plans have to be diagrammatic in scope. They have to be presenting ideas and not the actual form of workmanship.

Q. I am glad you brought that up, Mr. McGaughy, in connection with plumbing and fixtures which are to go in a building that you have designed. If there is any variation from the plans as drawn in your office, it has to be approved by you as the architect, or your firm, does it not?

A. That depends upon the contractual agreement we have.

Q. If it is one of those approximately 50 per cent in which you provide supervision, that is true, is it not?

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A. It is presented to us. However, whether it's a change or not, the method and equipment that the subcontractor is supposed to use is submitted to the general contractor and he in turn submits it to us for his protection to make sure that after they put it in it won't have to be ripped out because it doesn't meet the plans and specifications.

Q. And that involves the submission of shop drawings, does it not?

A. That is correct.

Q. And in many instances doesn't your employee look over the shop drawings and make corrections to them?

A. He checks them.

Q. And corrects them?



A. If they need to be corrected.

Q. And they do frequently have to be corrected, do they not?

A. In some cases. I don't know how I could answer that question directly.

Q. You wouldn't say whether it is frequently or occasionally?

A. I don't know what you mean by percentagewise in that. Very indefinite terms.

Q. Mr. McGaughy, in the stipulation it is stated that it is the defendant's contention that such copies of plans and specifications remain the defendant's property. Now, that is copies as distinguished from the original drawings. Does that represent your contention in this case?

A. Yes; that is true.

Q. Why do you contend that those copies of plans and specifications remain the property of your firm?

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A. Basically, because they represent our ideas and we have sold an instrument of service. In other words, we are rendering a professional service and they are not for re-use. Once they have served their purpose, they have transmitted the idea to the contractor, they have served their purpose to the client, as the case may be, they have served their purpose and they are no longer their property. We frequently as a courtesy to an owner turn over a set of plans to him so if they have something that occurs in later years that happens to it, or he wants to rearrange his partitions, he will know how to do it. But it's understood they are our property.

Q. The client pays for those copies?

A. Because they were used for his benefit, yes.

Q. He pays for them?

A. Yes.

Q. And you permit him to keep them?

A. No; I didn't say that.

Q. It is stipulated that he keeps them?

A. I think if it's stipulated, that is a misunderstanding of what we have said. I think basically we have said, and the

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case is, regardless of that, that normally a set, even two sets in some cases are given to the client after the job is completed so he will have record sets of drawings so he will know what is going on; anything happens to his building, he will know where to look for a heating line, bearing, or a particular piece of steel, that will help him out in future years. We do not turn over all the sets of blueprints that are not used. We do not give them to the client. Normally, we take them and throw them away.

Q. If there are any left in your office they are normally thrown away?

A. None left in the client's office; maybe one set.

Q. Isn't what you mean, Mr. McGaughy, that by the terms of your agreement with the owner that he is not permitted to take those plans and specifications and use them on another project?

A. That is our normal procedure. However, that is not what the agreement says. The agreement says they are our property.

By the COURT:

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Q. Isn't the reason for that, Mr. McGaughy—and I haven't even read the exhibit Mr. Tincher just had, but I am somewhat familiar with it I think—don't these standard forms of agreement provide somewhat like this: If I retain your firm to draw a set of plans to build a warehouse, or whatever it might be, I pay you a certain agreed fee, whatever that might be. Now, then, when I come to you I say I don't know whether I can finance this job myself and I have to, of course, have the plans before I can even start worrying about raising my money to go to a financial institution to obtain a loan. Therefore, I have to go into it to a certain extent. And you want the job and you can't lose money on it, so therefore there must be a fixed fee. But the so-called cream comes in the actual construction because you get a percentage of it then; isn't that true?

A. That depends upon—that to some extent is true. Like all professions, I think, there has been a considerable up-rating in the architectural team, along with everyone else, due to the

changes in economy. Whereas, what we might have done in 10 or 15 days, we don't necessarily do so. Today if you came, we would say, "We will prepare you a preliminary set of plans and specifications so you can arrive at an approximate estimate of cost." At that point, we would charge you a certain fee for that. At that point you would decide whether you wanted to go ahead with your project. If you went ahead and ordered the final plans, we would charge—we wouldn't care what you would do. You could paper your den with them.

Q. I am speaking, then, of preliminary plans.

A. That is correct.

Q. If I got those preliminary plans and if I had some knowledge of construction, which a lot of people think they have when they haven't, I might be sufficiently enabled by reason of those preliminary plans to either do the work myself or get some contractor friend of mine to do the work at some later date and cut you out of drawing the final plans and specifications; isn't that true?

A. That is one case. Another case that this thing would cover is, if you had—which our firm doesn't get involved in—but if you had a housing project and you came to us and said you wanted one set of very nice house plans drawn and you took that set of house plans and tried to build fifty houses with it, it obviously prevents that.

Q. It is those type of plans you have to protect yourself on—against that?

A. We retain ownership of all our tracings except those, of course, we turn over to the Federal Government, government agencies, and even all the jobs we have now, we have the tracings for them right now in our office. We store them and keep them away in a special room. And we can pull out and have a new set of blueprints made for a client if he needs them for, oh, some purpose, that is, what we would consider a legitimate purpose; not for a major—to try to take those plans and reproduce a building on the next block. That we wouldn't permit. It is not permitted. But if he wants to check some feature of a



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43 building; maybe he wants to air-condition, he wants to put a certain load on the roof. Have a set of plans, it can be checked. Those type of reasons is the reason we keep plans. We carry him a set of blueprints for the same reason; so he will have a record set. Sometimes it is merely a matter of arranging furniture in offices or changing partitions and so forth.

By Mr. TINCER:

Q. What you really mean then, Mr. McGaughy, is that you retain what might be termed the copyright to those plans and specifications, so that they are not to be used by someone else or even by that owner in constructing other projects?

A. That might be termed that way. But I would like to make this point clear too: That the copies basically remain our copy. If we choose to give a set to the owner, it is our choice, not the owner's choice.

The COURT. That is specified under condition 8 of the standard form agreement between owner and architect, which is Appendix D to the Stipulation. It specifies in there:

Drawings and specifications as instruments of service are the property of the Architect whether the work for which they are made be executed or not, and are not to be used on other work except by agreement with the Architect.

By Mr. TINCER:

Q. I have a few questions, Mr. McGaughy, in connection with your nongovernment clients. When you prepare plans and specifications for such an owner, do you normally prepare a notice for bids in connection with that?

A. If we are instructed to do so. It is sometimes we do.

44 Q. And do you send copies of the plans and specifications out to the contractors who request them in those instances?

A. As the owner's agent.

Q. Would it be true that on most nongovernment projects of any size that you would send copies to contractors outside the State of Virginia?

A. I wouldn't say definitely. I will say if anyone requests them we would send them to them. How many requests you would have, I wouldn't know. But if they requested, they would receive them under the proper terms set forth, meeting deposit requirements and so forth.

Q. If it is a large project you normally expect some out-of-State contractors to be interested, do you not?

A. That is a very difficult question to give you a reasonable answer to. I don't know, frankly. Government-connected work you usually find they do. That is, work that might be like a county school where it has federal funds in it, those jobs are usually bid by some out-of-State people. Pure and simple private work is very seldom bid by out-of-State people. Why that distinction is, I don't know, frankly. But that is the way it works.

Q. Take the Greenco Hotel Project, No. 848 on this job list, was that project in which you had some out-of-State bidders?

A. I don't know of any. I won't say there weren't, but off-hand I don't know of any out-of-State bidders. I can't say that they didn't.

Q. The Perlin Packing Company project, did you send plans and specifications on that one to some out-of-State bidders?

A. I don't think so.

Q. You don't recall?

A. Well, the reason I say that, as far as I know there were no general contractors out of the State that bid that particular project.

Q. How about suppliers, Mr. McGaughy?

A. There could have been suppliers, but there are no general contractors to the best of my knowledge that bid that contract.

Q. Wouldn't you state on a project the size of the Perlin Packing Company that you would anticipate at the time you were preparing the plans and specifications that there would be either contractors or suppliers from out of State to whom you would send copies of the plans and specifications?

A. I wouldn't be a bit surprised. As I freely admitted to you when we started this testimony a second ago, that if anyone requested them we would have sent them to them.

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Q. You would expect someone out of State to request them?

A. I don't know. But if they had, we would certainly have sent them to them. It's just a matter of whether we received the request or not, whether they got them or not.

Q. Your firm recently has done some work in preparing plans and specifications with reference to a housing project known as the Norfolk Housing Authority Project No. VA-611. Are you familiar with that project?

A. I think we clarified that once before, and I think I can understand the confusion. But, basically, our firm did not do the work on that project.

Q. Is this true: that your firm worked in conjunction with a New York firm in preparing a part of the plans on that project?

A. I think you are forgetting something, if I may refresh your memory. That project is a left-over project and it is involved in several individual names and it is not the property of our particular partnership. In other words, our particular partnership has no project with the Norfolk Regional Authority Housing Project to do anything.

Q. Let's get at it this way: Have the employees of McGaughy and Associates been doing work in drawing of plans related to this project?

A. They might have done something on it.

Q. In fact they have, have they not?

A. If they have, it has been very, very little.

Q. What they did was correlated with what the New York firm did and put into the final plans and drawings; isn't that right?

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A. That is right.

Q. And your preliminary drawings in connection with that project I assume were sent to the New York firm to be so correlated, is that correct?

A. To this extent, I'd like to make this point clear: Lublin, McGaughy and Associates has no contract or obligation or agreement on that project whatsoever.

Q. I am speaking of what your employees have done, Mr.



McGaughy. The work of your employees in preparing drawings, sketches and other work in connection with that project, after such drawings were prepared they were sent to the New York architectural firm to be correlated with the work of that firm, were they not?

A. In theory the thing has worked in this way—and I have to use the word “theory” because sometimes we short-cut procedures. But basically the architectural work on that project, if done here in Norfolk, whatever was done here in Norfolk was done by Mr. Alfred Lublin, an individual, and in turn if it was sent, theoretically he sent it. We didn't do it.

Q. But it was the same employees, whether they were doing work in Mr. Lublin's name or your name or the firm name?

A. That is right. But it was done for Mr. Lublin and not Lublin, McGaughy and Associates.

Q. Also your employees have done work in connection with the VA-66 and VA-610 which also are Norfolk Housing Authority projects, is that right?

A. Yes. But I think if you will check you will find VA-66 was completed before this particular case comes into being. I would like for that to be so clarified.

Q. Whenever it occurred, after that work was done by your employees and the plans and specifications were put in final form, your office sent out copies of the plans and specifications to various out-of-State contractors, did it not?

A. Most of these projects, the basic procedure is that if a contractor requests plans and specifications usually they are requested of the Housing Authority, they notify us and we have usually, either the blueprinter, or if we have extra sets in the office, we have our people label them and turn them over to the Railway Express for delivery, express collect, or whoever requested them.

Q. In many instances, in connection with these three projects that I have mentioned, there were out-of-State contractors to whom you sent copies of the drawings and specifications?

A. Yes; I think so.

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By the Court:

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Q. Mr. McGaughy, I suspected in going through these instructions that I would find something similar to this. As you and I know—I don't know whether Mr. Tincher is aware of it—that under the Virginia law on any bid or contract in excess of \$20,000 the contractor must be registered under the laws of the State of Virginia. I notice in the Perlin Packing Company specifications under your instructions to the bidders that you direct that to their attention. Now, there would be no need of putting that provision in there in the form of an invitation or instruction to bidders unless you did contemplate that there might be an out-of-State contractor that would bid on the job; isn't that true?

A. That particular provision, sir, is required by Virginia statute. We must put it in there. It is required.

Q. In other words, you are required by the law in preparing any instructions to bidders to include that provision in there; is that correct?

A. Yes, sir.

Q. And that is the reason that you put it in there rather than because of the fact that you contemplate that there may be or may no be an out-of-State bidder?

A. Yes, sir; plus the fact also it is illegal in the State of Virginia to award a contract to anyone who doesn't have that license.

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Q. I knew that but I did not know that there was any statute dealing with the responsibility of the architect to place it in their instructions to bidders.

A. The contractors are very smart in that deal. They have made it our obligation to look out for them.

Q. I realize that. You say that is definitely a statute?

A. That is my understanding of it.

Q. You are required to do it in any event?

A. Yes, sir.

By Mr. TINCHER:

Q. If I understand this matter then, Mr. McGaughy, out-of-State firms that bid on construction projects are required to

be licensed in the State of Virginia if the project is \$20,000 or more?

A. Yes; and that also applies to all suppliers and subcontractors, is my understanding of the law. I might be mistaken on that.

Mr. HOFHEIMER. If your Honor please, may I recess one second to ask Mr. McGaughy a question suggested by counsel for the Government? We might be able to untie this Gordian knot and shorten this part of the proceeding.

The COURT. Suppose we take a brief recess at this time.  
(At 11:55 a. m. a fifteen-minute recess was taken.)

AFTER RECESS

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By Mr. TINCER:

Q. Mr. McGaughy, in order to move along as swiftly as possible, I believe it is understood now that in the regular course of your business in the past and your expectation in the future, that in connection with projects for private owners as distinguished from government clients, that plans and specifications prepared by you regularly have gone to out of State contractors and you expect them to do so in the future; is that correct?

Mr. HOFHEIMER. Before you answer that question now, excuse me one minute.

(Counsel conferred briefly.)

By Mr. TINCER:

Q. Changing that to the extent of saying from time to time rather than regularly; is that correct?

A. Yes; I think we estimated for you in the past at your request that approximately 2 percent of the plans prepared by us went out of the State on private work.

Q. Now, that 2 percent, Mr. McGaughy, what does that relate to—2 percent of what?

A. You can relate it to either one of two ways. I think your percentage would be pretty near correct out of all the bidders; out of 100, two of them would probably be from out of State.



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Q. With reference to out of State projects?

A. We are talking about in State.

Q. With reference to nongovernment projects?

A. Private, yes.

Q. And 2 percent of the bidders in your estimate would be people who are outside of the State in which the plans are prepared?

A. Yes.

Q. Mr. McGaughy, your estimate of 2 percent in your deposition related to the jobs listed on the job list which has been put in evidence in this case. Now, many of those jobs never reach the point in which plans and specifications are prepared for the owner, isn't that right?

A. Some of those didn't; that is correct.

Q. Wouldn't it be more correct to say that a larger percentage than 2 percent?

A. I don't think so; no.

Q. And the 2 percent would relate to all the copies of plans and specifications which are prepared in connection with these projects and 2 percent of them go to out of State bidder?

A. I think that is a fair figure; yes.

Q. I have a few questions in connection with the Southern Shopping Center project, Mr. McGaughy. Is that a fairly large project in relation to the other work that your firm does?

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A. It is; will be a sizable project; yes.

Q. About what amount approximately in construction costs do you estimate it will be?

A. At the present moment we haven't actually estimated but we feel confident it will probably be in excess of a million and a half or so. I don't know just how much.

Q. I believe you estimated in your deposition that it would be approximately two and a half million?

A. It could very easily be; although we haven't made final estimates because final plans aren't completed.

Q. That job No. 969—

The COURT. I don't have the project list to refer to. Where is this project you are talking about?

The WITNESS. This project is in Norfolk.

By Mr. TINCHER:

Q. Are the plans completed on that project, Mr. McGaughy?

A. No, sir.

Q. At what stage is the work of your firm at the present time?

A. Very difficult question to answer. You are working with a number of various individual stores like you have in the shopping center. Some are pretty well along. Some haven't even started as far as the planning for that particular tenant.

Q. Is it true that a number of tenants have already been selected and with whom leases have been executed?

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A. That is correct.

Q. Would you name some of them that have already been selected and with whom leases have been executed?

A. The leases that have been executed to date all contain certain provisions that show that they are predicated upon the acceptance of the final plans and specifications; that is mutually accepted by both the tenant and the owner. To date, since none of those have been completed actually, you actually haven't a lease in effect, I suppose, if you want to be technically correct about it.

Q. Without reference to whether there is abandoning of a lease, there is a tentative agreement between the owner and certain prospective tenants?

A. That is correct.

Q. And would you give us the names of some of those prospective tenants?

A. The best of my knowledge, J. C. Penny, F. W. Woolworth, Giant Food of Washington, D. C.

Q. Giant Foods is a Washington, D. C.?

A. I think it is a Washington, D. C., firm. I am not positive of that. I know they have stores in Washington, however. There are others I can't remember right offhand.

Q. As architect on that project, do you have any dealings with these tenants?

A. We obviously have to know their requirements to prepare the plans for them. They have an architectural depart-

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ment of their own, most of these large chains do, and have to—Theoretically, all our negotiations go through the owner and his real estate agency. Actually, after certain preliminaries have actually been accomplished, to save time and effort, we communicate directly with their owners, that is, the firm's architect. Most of these firms do have staff architects.

Q. And in that communication, you are in contact with them by telephone and correspondence at out of State points; isn't that right?

A. Yes.

Q. Woolworth, J. C. Penny, and Giant Foods?

A. I think so; yes.

Q. Does that include the submission to these prospective tenants of preliminary drawings and plans which your draftsmen have worked on?

A. In the final analysis, they are submitted to them.

Q. That has been done already in connection with these tenants, has it not?

A. In some cases; not all cases.

Q. That would be true with reference to the ones we have named, would it not?

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A. I'd have to qualify that answer. Some received certain drawings; whether we consider them the preliminaries or what stage they are in—it's a rather confusing thing. You are asking for a definite answer and I can't give it to you. I will tell you this much: It's our intent to submit these plans if and when available.

Q. You have already?

A. What is available we have submitted.

Q. You have submitted to them drawings on which your draftsmen have performed work?

A. Yes.

Q. And sent them out of State for the approval of these tenants?

A. That is right.

Q. One of the projects or a series of projects on which your firm is engaged relates to work for Washington Suburban Sanitation Commission, does it not?



A. That is right.

Q. And that commission has its headquarters at Hyattsville, Maryland?

A. Yes.

Q. Approximately how many related projects are involved in that work, Mr. McGaughy?

A. I don't know the exact number but somewhere in the neighborhood probably fifty individual projects have been involved with them in the last year.

Q. And I believe you testified in your deposition that approximately 30 per cent of the work of your Washington office for the past month or so has related to those projects?

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A. I think that is correct.

Q. How is the work for this Washington Suburban Sanitation Commission accomplished, Mr. McGaughy? And to limit that, I mean are your field men involved in that work?

A. Yes. The field men gather certain basic measurements upon which all the plans are based and the plans are drawn by our Washington staff and turned over to the Washington Suburban Sanitation District Commission, at which point I assume that they put them out for bids.

Q. In the course of that, isn't it true that certain preliminary drawings or plans prior to being put in final form are submitted to the commission for their approval, examination, and suggestions?

A. Yes.

Q. That would be submitted to them at their office at Hyattsville, Maryland, wouldn't it?

A. Yes.

Q. And such submitting of plans, drawings prior to the final draft might occur two or three times on a particular project before the plans would be put in final form; isn't that right?

A. Might be. I don't know. I doubt it, that many times.

Q. Do you have any personnel in your Norfolk office who have worked on the plans for the Washington Suburban Sanitation Commission?

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A. Yes.

Q. Did that involve the preparation of drawings in the Norfolk office?

A. Basically, no. There might have been—I can't say there haven't been exceptions to that rule. But generally speaking, certainly the work is done in Washington. There might have been an occasion or two of some particular crisis, so to speak, that some work might have been done here. I don't recall it offhand.

Q. Your sanitation expert people, so to speak, are located in the Norfolk office rather than the Washington office?

A. We have them located both places.

Q. You do?

A. Yes.

Q. Was there a period of time that the work was being done largely in the Norfolk office?

A. No.

Q. What kind of work is your firm doing at the present time in connection with the project at Quantico, Virginia?

A. Nothing.

Q. Have you recently completed the work for the Navy Department with reference to quarters and training facilities at Quantico?

A. We prepared what they term the training school for them, plans and specifications, which have been turned over to them. I have been informed it is now out for bids. We are at the present time not doing anything with regard to that project at all.

Q. Which office handles the work for that project?

A. Generally speaking, the work for that project was assigned to the Washington office. As I have said before, why we don't follow a necessarily rigid line, we keep that arrangement as flexible as possible to accomplish the work in an expeditious manner.

Q. And some of the work on it was done at Norfolk?

A. Yes.

Q. And whatever drawings were made in the Norfolk office were then correlated and integrated with the drawings made in the Washington office for submission in that project?

A. I would think so.

Q. I assume that in a similar manner to what you have already described those drawings and plans would be submitted in preliminary state for approval of the Navy Department before the final plans were completed; is that right?

A. Yes.

Q. Mr. McGaughy, this job list, which I believe is Appendix A to the stipulation, refers to various jobs that your company has at present and has done in the past and in some instances the location of the work is not clear from it. I would like to ask you about a few of these.

Mr. TINCHER. And it might expedite matters, your Honor, if the witness could have Appendix A, the job list.

Q. (Continuing) No. 947, which is U. S. Army, abbreviation "O. C. E." would you tell us what "O. C. E." is?

A. Office of Chief of Engineers.

Q. And that relates to an Army aviation facility or facilities. Do you know where they were located?

A. We don't know where they will be located.

Q. Would that be in the nature of standard plans which could be used for construction anywhere the Army chose?

A. That is right.

Q. In dealing with the Army on that particular project, did you deal with officials located at the Office of the Chief of Engineers?

A. Yes.

Q. And they are located at Gravelly Point, Virginia?

A. That is right.

Q. Was this work handled and performed by your Washington office employees?

A. A part of it is being handled by Washington and part by Norfolk in this particular case. A group of buildings and we split it up, as I have mentioned before, we split the work load so we can handle the work to the best interest of our client as well as to ourselves.

Q. The drawings would be prepared in the two offices, would be correlated in the final?



A. It may be in this project they might not have to be correlated. There are a number of buildings, each building has a set of plans. Might do a complete set of plans and turn them over. Washington might do a complete set of plans and turn them over. Might not have any correlation involved.

Q. Normally, wouldn't they be fastened?

A. No. Each building speaks for itself.

Q. Is there some submission of such plans in preliminary stages before the final plans are completed for approval of the Office of Chief of Engineers?

A. Yes.

Q. And those would be submitted to their office at Gravelly Point, Virginia?

A. That is right.

Q. Project No. 950, U. S. Navy, P. R. N. C. Will you explain the "P. R. N. C."?

A. P. R. N. C. is Potomac River Naval Command.

Q. Are those plans and specifications prepared in the Washington office or Norfolk office or both?

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A. This particular project I think is being prepared completely in the Washington office, although on any single project, I would like to make a point clear. I have tried to clarify it. We have not set rule where we prepare a set of plans. If we want to do part in Washington we do it; if we want to do part in Norfolk, we do it. Normally, they are all reviewed by a partner. It's a matter of time or expediency whether the partner goes to Washington or we bring the plans to Norfolk. Normally, the partner would go to Washington instead of shipping them down here. Any way you want to set a rule, there is always an exception that would take place sooner or later.

Q. Then it would not be unusual for the drawings and plans at one stage or another to be transported from one office of your firm to the other?

A. Certain drawings are transported. I wouldn't say whether it was unusual or usual. It depends upon each individual case. Unless you go through each individual one and

what was happening at that time, the work load of the two offices and staffs, I just can't give you a definite answer that applies, that holds for any length of time.

Q. At any rate, those plans and specifications relate to particular buildings which are to be constructed at Quantico, Virginia?

A. That is right.

Q. And Project No. 963, U. S. Navy, Potomac River Naval Command, plans and specifications for repairs to hangars, Buildings 29, 47, and 54, U. S. Naval Air Station. Can you tell me where those hangars are located, Mr. McGaughy?

A. They are across the river from Washington National Airport, the navy field there. However, whether that particular field is located in Washington or Maryland, I really don't know.

Q. You don't know whether it is outside the District or inside the District?

A. No; I don't, frankly.

Q. Is the work on that project being done primarily by your Washington office?

A. That is right. As a general rule, the work in the Washington area is done by the Washington office. That is the basic concept of the organization. Whereas, the work in the Norfolk area is done by the Norfolk office. We tried to follow that wherever possible. There are exceptions.

Q. Turning over to the second sheet, Project No. 939, and there are a series of them, those relate to the Washington Suburban Sanitation Commission about which you have already testified?

A. Yes.

Q. On the third sheet, Project No. 917, U. S. Navy, Fifth Naval District, relocation of Coast Guard radio station. Could you describe the work which your firm did in connection with that?

A. To date we have done the advance planning report. We have just in the last, I'd say thirty days, received the letter of intent from the Navy to proceed with the final plans and specifications for this project.

Q. In preparing the advance planning report, did your field men go out and make any surveys, obtain any data for use?

A. We obtained whatever data was necessary. I don't know whether it involved field men as such or whether it involved some of our technical professional men that had to make on-the-site examination.

Q. Regardless of who did that site examination, it had reference to a radio station which currently is in operation, did it not?

A. No. There is no radio station there. The Coast Guard has a radio station in this general area. My understanding of it, it is in the approach zone of the Oceana Naval Air facility and they want to move the Coast Guard station for safety reasons to an entire new area. The present setup, what I understand, will be completely abandoned and a complete new facility constructed. After the new one is constructed they will move from the old to the new.

Q. It has to do with the placing in a different position of a radio station?

65 A. It's a new facility, to take place of the present one.

Q. I think we understand each other on that. Project No. 932, which is for the Office of Chief of Engineers, special AAA facilities. Can you tell me where they are to be located?

A. No. These special—what they call AAA facilities are more or less a standard plan nature, ammunition facilities, it has little magazines and they can be built anywhere.

Q. Was that project performed primarily in the Washington office?

A. No. That particular project I think was performed in Norfolk.

Q. Turning over to No. 885—

The Court. Is this all necessary?

(There ensued discussion between Court and counsel, after which the following proceedings were had:)

The Court. Let's interrupt Mr. McGaughy's testimony here and at least get those employees back to wherever they belong.



**ANNE M. HOOVER, SWORN.**

**Direct examination by Mr. TINCHER:**

**Q. Will you state your name, please.**

**A. Anne M. Hoover.**

**Q. Where are you employed, Mrs. Hoover?**

**A. 1001 Connecticut Avenue, Washington, D. C.**

**Q. By Lublin, McGaughy?**

**A. By Lublin, McGaughy and Associates.**

**Q. How long have you been employed there?**

**A. I am not a permanent employee. I am just a temporary employee, off and on since last November.**

**Q. What type of work do you do, Mrs. Hoover?**

**A. Well, as I am the only secretary there I do whatever comes under the heading of secretarial duties, such as typing, taking letters, typing letters, specifications, memos; no book-keeping.**

**Q. Have you done any work in connection with the Washington Suburban Sanitation Commission?**

**A. Yes.**

**Q. If you have written any letters in connection with that, would you tell us what they related to?**

**A. There are letters written as to when the company's services will be available, immediately or in the near future, and when the preliminary and final drawings will be submitted.**

**Q. Do those letters relate to the furnishing of preliminary drawings?**

**A. No; it just states about how many weeks before they will be ready.**

**Q. When they are ready, do you know what is done with them.**

**A. Well, they don't come through me but they are delivered by someone from the office, as a rule.**

**Q. Can you state whether or not the correspondence which you handle is with out-of-State people and, if so, to what extent?**

**A. Well, I would say it was mostly with people in D. C. Some out of State. It's hard to say. I mean, I am not stat-**

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ing this definitely because it's hard to say which it is most of out or in.

Q. Can you state whether or not there is transmission of drawings and plans with reference to work done in the Washington office between that office and the Norfolk office of Lublin, McGaughy?

A. I'm sorry, I didn't follow you there.

(The question was read by the reporter.)

A. Perhaps there is some.

Q. Any that you know about?

A. Well, that really doesn't come through me.

Q. From your work in the office, do you see any of that being done?

A. I would see some.

Q. How are those plans and drawings usually transmitted?

A. By someone, by person.

Q. Do you know whether any are transmitted without being carried all the way personally, whether they are transmitted by Capital Airlines?

A. You mean between Norfolk and Washington office?

Q. Yes.

A. Yes; at times. They would be taken to the airport and sent by plane.

Q. In the course of your work do you have occasion to handle telephone calls with people who are calling from outside the District of Columbia?

A. I take all calls as a rule.

Q. How frequently and to what extent would you say that you have calls from out of State?

A. Well, it could be daily. It could be so many a week. It's very hard to say, because I don't always know who the calls are coming from.

Q. Could you say whether that is a regular daily occurrence or not?

A. Out of the State?

Q. Yes; calls coming in from outside the District of Columbia.

A. Perhaps it is daily. It varies.

Q. Could you estimate roughly what percentage of your correspondence is with firms or companies or people outside the District of Columbia?

A. Well, I would say perhaps 50-50. The companies that are close by Washington it seems it's right in the vicinity but you are still over the line, if you know what I mean, going into Maryland. It's probably 50-50.

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Q. That would be approximately half of them outside the District?

A. Perhaps so. I hate to be pinned down because I am not sure.

Mr. TINCHER. You may question.

Cross-examination by Mr. HOFHEIMER:

Q. Do you work more or less 40 hours a week, Mrs. Hoover?

A. I work 40 hours a week.

Q. Exactly?

A. As a rule.

Mr. TINCHER. I would like to ask the witness if she has on occasion exceeded 40 hours a week.

The WITNESS. I perhaps have maybe once since I have been there. But not being a permanent employee, it's very hard to state.

VICTOR B. TATE, sworn.

Direct examination by Mr. RAY:

Q. Mr. Tate, you are employed by Lublin, McGaughy in Washington, D. C., office?

A. Yes, sir.

Q. During the past several weeks or months, whichever would be more convenient to you, what has been the nature of your duties as an employee of this defendant?

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A. About the last three months, sir, I have been instrument man on the party.

Q. I didn't understand.

A. I say for about the last three months I have been instrument man on the project, surveying project.



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Q. What project?

A. Washington Suburban Sanitation District.

Q. Where do you report every morning when you start work?

A. To the office.

Q. Washington, D. C.?

A. Yes, sir.

Q. Then—this is leading but I don't think there is any dispute about it—then do you leave the office in Washington, D. C., and go out into Maryland on this instrument party to gather information and data?

A. Yes, sir.

Q. When you gather that information and data what do you do at the end of the day, or during the day? Tell us which.

A. At the end of the day we usually have these field or  
71 level books. We bring the books back in and the office people compute what we gather during the day.

Q. Do you know for what purpose you are gathering this data?

A. Yes, sir.

Q. What purpose is it?

A. To find the land that the sewer and water mains will run through and how well they can tie into the existing system, each little subdivision.

Q. Who utilizes this data which you obtain in Maryland and bring in the District of Columbia, what employees, what type of employees?

A. It will be the office people, sir.

Q. Draftsmen?

A. Indirectly. Mostly it will be a man called the plotter who plots up the information that I have on these different permanent records or plans. And from there the draftsmen will take over.

Q. Your travel backwards and forwards between the Washington office and the Maryland project by car?

A. Company truck, sir.

Q. You drive it?

A. Sometimes.

Q. Do you drive it more frequently than not, or what is that situation?

A. It's usually divided. There are three people in the crew and whoever gets the truck first takes it.

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Q. On those trips do you carry with you certain equipment across the line?

A. Yes, sir.

Q. Now, in anticipation of counsel's questions probably, do you work more than 40 hours a week?

A. Yes, sir.

Q. Is that a regular thing?

A. Yes, sir.

Q. Generally speaking, how many hours a week would you work?

A. I would say around 50, 55, sir, something like that.

Cross-examination by Mr. NUSBAUM:

Q. What is your average pay per week?

A. Two-week pay period it usually runs one hundred fifteen, one hundred twenty. That is what I get back. I am not quite sure what the full thing; around one hundred forty I suppose with taxes.

Q. Where is the work that you do perform?

A. It is performed in Maryland.

Q. How much did you say you get for two weeks work?

A. It runs around \$140, sir.

Q. One hundred forty?

A. Yes, sir.

EDWARD R. WALL, sworn.

73

DIRECT EXAMINATION BY MR. TINCHER:

Q. Will you state your name, please.

A. Edward R. Wall.

Q. Where are you employed, Mr. Wall?

A. The office of Lublin, McGaughy and Associates, 220 West Freemason Street, Norfolk.

Q. What is your job?

A. I am an architectural draftsman.

Q. How long have you been employed by this firm?

A. A year and a half I believe is correct.

Q. Would that be from September of 1954?

A. That is correct.

Q. What is the nature of the work you do?

A. General title and I do architectural drafting; anything pertaining to the architectural aspect of the building.

Q. Are you familiar with the work done by the field men?

A. Somewhat, what applies to our phase of the building.

Q. Could you tell us briefly what the field men do with reference to the work you do?

A. Well, the survey data that the field crew bring in terrain and test borings we use to determine the site adaptation of the building or re-site the building to the terrain.

74

Q. You are speaking of the terrain where the building is to be located?

A. Yes. The survey party would figure the contour and the elevations on the property and they would probably take test borings and we would use that to site that building.

Q. To put your answers into terms that we can all understand, are you saying that the field men take measurements and obtain data which then are used in connection with your drawings?

A. Yes, sir.

Q. And they bring those measurements and data back to your office for you to use, is that right?

A. Yes, sir; it's brought back to our office. We get it second-hand from the survey department.

Q. How is that information used by you, Mr. Wall?

A. Well, the elevations; for an example, we would set the floor elevation of a building so that when the finished grade was graded the water would drain away from the building.

Q. Surface drainage?

A. Yes, sir.

Q. Would it also have a part in the sewerage drainage?

A. Yes, sir.



Q. Do you work on any preliminary drawings?

A. Yes, sir; I do.

Q. What are they used for?

A. The preliminary phase of the building is when we have the general idea of what the client wants we draw up the phase from the architect's sketches and his print of it is submitted to the client for his approval before we go any deeper into the building.

75

Q. Did you make any preliminary drawings on Project No. 906 which is the Quantico job for the Marine Corps?

A. I did some sheet planning. That isn't the preliminary sketches, although I did do some minor work on that.

Q. Sheet planning, did that include drawings?

A. That is the setting up a drawing sheet so that the information put on it will be in logical sequence.

Q. Did you make any drawings on those sheets?

A. Yes.

Q. What was done with those drawings after you made them?

A. It was my understanding it was sent to Washington for the Washington office to draw the plans.

Q. For the Washington office to carry the work from that point on?

A. That is true.

Q. Have you seen the final drawings and plans with reference to that project?

A. I saw a set of prints.

Q. Where did you see that?

A. It was in our office.

Q. In Norfolk. Would you tell the Court approximately what size project that was with reference to the drawings and the specifications?

76

Mr. HOFHEIMER. I object to that, your Honor. I don't think the size of the project has anything to do with it.

The COURT. You mean the physical size?

Mr. TINCHER. That is correct, your Honor; to give the Court an idea of the volume of this set of drawings and specifications.

The COURT. Mr. Tinch, suppose you did that on every project. Where would we be?

Mr. TINCER. It would take quite a long time, your Honor.

The COURT. You have introduced in evidence in the stipulation I believe an appendix, by way of appendix, which apparently are detail plans for a new hotel, Greencove Corporation, at Virginia Beach. Now, suppose you did that on every one of them? Where are we going to stop?

Mr. TINCER. This is the only one, your Honor.

The COURT. Mr. McGaughy said that practically all of his work was of substantial size, that they did very little of the residential area; didn't he say that?

77

Mr. TINCER. Yes, he did.

The COURT. I just want to ask you, what else do you want in this record other than Mr. McGaughy, and he can't go back on his statement—it wouldn't make any difference what this gentleman said—but he can't go back on his statement in which he said, if I recall correctly, that he did very little of the residential homes and that practically all of the projects were of substantial size. Now, what more do you want than that? Suppose this gentleman says that it was five million square feet or he says it was a hundred square feet, what difference does it make? Does it do any more than supplement what Mr. McGaughy has told you?

Mr. TINCER. It would only be supplementary.

The COURT. I sustain the objection.

By Mr. TINCER:

Q. Mr. Wall, do you know anything about the project No. 897 which had to do with the Norfolk News Agency?

A. Yes, sir.

Q. Where is that located?

A. The building is located on Tidewater Drive, Norfolk.

Q. Do you know where the plans and specifications were prepared for that project?

78

A. In Washington.

Q. Do you know whether any work in connection with that project was done in Norfolk by Norfolk office employees?

A. Yes, sir.

Q. What work?

A. There were additions, alterations to the tracings that we received from the Washington office.

Q. Do you know whether any preliminary work was done in the Norfolk office?

A. Yes, sir; the preliminary plans was done here.

Q. Any work by the field men?

A. The usual survey and site analysis was made by the survey people.

Q. Were the results of that survey work transmitted to the Washington office in connection with the work done there?

A. I believe it was; yes, sir.

The COURT. The Norfolk News Agency is a Washington controlled concern, isn't it, or don't you know?

The WITNESS. I don't know, sir.

Mr. HOFHEIMER. I can answer that. I would say it is not Washington controlled but the proprietor of it, his father lives in Washington.

By Mr. TINCER:

Q. Mr. Wall, have you done any work on the project No. 816 and 860, which is identified as the Navy electronic training facility?

79

A. Is that Faeute?

Q. Faeute.

A. Yes, sir.

Q. To what extent?

A. I worked on the project during its complete stages and different phases of the architect's drawings.

Q. You prepared drawings in connection with that project all the way through?

A. Yes, sir.

Q. Have you done any work on the Southern Shopping Center project?

A. Yes, sir.

Q. Would you tell us what you have done on that?

A. At the beginning of the project I was assigned the job



of starting the architectural drawings on the F. W. Woolworth store and then after that was underway we changed and I was put on the Giant Foods store which was of more importance at the time.

Q. Did you prepare some drawings in connection with the stores that are to be occupied by those two companies?

A. Yes, sir.

Q. You know what happened to the drawings that you prepared?

A. They are still in the office.

80 Q. Do you know whether any prints from those offsets have been sent anywhere and, if so where?

A. Only probably in the preliminary stage.

Mr. HOFHEIMER. Excuse me. You wanted to know if he knows of his own knowledge?

Mr. TINCHER. That is correct.

Q. Do you know of your own knowledge if any prints from drawings you have made have been sent outside of the State of Virginia?

A. Of the preliminary stage.

Q. Do you know that?

A. As far as I know, yes, sir.

Q. Where?

A. I am not too sure of that. It was just on what the returned prints were marked. We had some that were approved by I think it was Atlanta office or something like that.

Q. The prints after they came back had that notation on them?

A. The ones that they drew from our preliminaries and returned to us.

Q. And what notation was that?

A. We submitted the preliminary plan for their approval; they drew up their own floor plan and sent it back to us and that floor plan which was theirs was marked "Atlanta office."

81 Q. When you speak of "they" and "theirs" to whom are you referring?

A. F. W. Woolworth Company.

Q. Do you know anything about shop drawings, Mr. Wall?

A. Yes, sir.

Q. What are they?

A. They are drawings submitted by subcontractor through the contractor and then to the architect for approval on articles that would go into a building that would have to be prefrabricated or approved by the architect.

Q. Do you have anything to do with such shop drawings?

A. Yes, sir; I have occasion to correct or approve the shop drawings.

Q. For what clients or to what extent since you have been working for Lublin, McGaughy have you worked on shop drawings?

A. Well, I am not sure I understand exactly what you want. Whenever a building is finished we get the shop drawings in and I work as they come in. Probably I have touched on all of the buildings we have done that we have gotten shop drawings on.

Q. Since you have been employed?

A. Yes, sir.

Q. When you speak of "when the building is being finished," do you mean when the final plans have been completed?

A. Yes, sir.

Q. The shop drawings then come to you for review and whatever you do with them, either before construction begins or during the course of construction; is that right?

A. That is right.

Q. What types of materials do those shop drawings relate to?

Mr. HOFHEIMER. If your Honor please, again, I want to facilitate the trial of this case and I certainly don't want to do anything to obstruct it but it just seems to me this is interminable. This man testified just a minute ago those plans went out of the State. Mr. McGaughy testified if they hadn't gone they would have gone. It seems to me it is all cumulative.

(There ensued discussion between Court and counsel, after which the following proceedings took place:)

Page

The COURT. Please proceed with some pertinent questions, Mr. Tincher, and not repetitious questions. If you have got the answer out of Mr. McGaughy, he can't go back on that answer. Neither can Mr. Lublin or anybody else associated with that firm.

83 Mr. TINCHER. Thank you, your Honor. The questions I am asking this witness relate to shop drawings and I want to know what shop drawings pertain to and where they go. I don't believe Mr. McGaughy covered that in his testimony.

Q. What types of materials, Mr. Wall, do these shop drawings relate to?

A. They relate to the architectural aspect of the building as far as I am concerned: the doors, windows, material, floor material, bricks, and so forth that we have to approve. Some of them come in the form of shop drawings and others come in the form of samples.

Q. Are partitions included in that?

A. If there are partitions they have to be prefabricated.

Q. Where are the manufacturers of those materials that you have mentioned located?

Mr. HOFHEIMER. Now, if your Honor please, I don't know that he knows that.

The COURT. Let's see if he knows it.

By Mr. TINCHER:

Q. If you know, where are those manufacturers located?

A. Well, they vary. The manufacturer's shop drawings have their name on them. And they can come from most anywhere in the country.

84 Q. State whether or not they are located outside the State of Virginia and, if so, to what extent.

A. I have corrected shop drawings from out of State.

Q. Is that a usual part of your work?

A. Well, I guess maybe half the time would be the ones that I have seen probably.

Q. Half the time the drawings which you correct are from manufacturers located outside the State of Virginia?

A. Yes, sir; I guess so.



**Q.** What happens to those shop drawings after you check them and correct them?

**A.** I turn them over to Mr. Marshall who checks them and then he sends them back to the contractor as far as I know who in turn, so I understand, sends them back to the manufacturer.

**Q.** From your work in connection with those shop drawings, what can you tell the Court about where the materials that are described in those shop drawings are obtained?

**A.** I would assume the materials would come from the same manufacturers.

**Mr. HOFHEIMER.** Objection. This is a Government witness and his assumption——

**The COURT.** Do you know, Mr. Wall?

**The WITNESS.** Only from saying that the manufacturer submitting the shop drawing would be the one that shipped the material in.

**By Mr. TINCHER:**

**Q.** If you can, tell the Court from your knowledge and your experience in working with them whether those materials come from outside the State of Virginia or not.

85

**A.** Well, as I previously stated, I would have to assume that. I would have to assume. I have no absolute way of proving it.

86

**ROBERT D. MULLINS, sworn.**

**Direct examination by Mr. TINCHER:**

**Q.** Will you state your name.

**A.** Robert Dodson Mullins.

**Q.** Where are you employed, Mr. Mullins?

87

**A.** Lublin, McGaughy and Associates, 220 West Freemason Street.

**Q.** Norfolk?

**A.** That is correct.

**Q.** What is the nature of your work?

**A.** The nature of my work, I am chief of party on the

survey crew. We do work for contractors, and also, very seldom—not very seldom, but now and then we do partial lay-out for land, partial surveys.

Q. In doing that kind of work have you had occasion to travel to points outside the State of Virginia?

A. Two or three times; yes, sir.

Q. Where was that?

A. The only place I ever been out was up to Washington. We worked at Washington Sanitation Department.

Q. Inside the District or in Maryland?

A. I believe it was in Maryland.

88 Mr. TINCER. If the Court please, in lieu of asking this witness any further questions, I have an understanding with counsel for defendants that this witness will testify that he did work as described in paragraph 12 of the stipulation with reference to the Naval Air Station hangers, taxiways and so forth, and that the government planes operated there by the Navy fly across State lines. With that understanding, we have no further questions of this witness.

Cross-examination by Mr. NUSBAUM:

Q. You testified you went out of the State two or three times. You have been employed with Lublin, McGaughy since October 1st, 1950; is that correct?

A. That is correct.

Q. In that period of time you have been out of the State two or three times?

A. Yes, sir.

BARBARA M. SAVAGE, sworn.

Direct examination by Mr. TINCER:

Q. Will you state your name, please.

A. Barbara M. Savage.

Q. Where are you employed, Mrs. Savage?

A. Lublin, McGaughy and Associates, 220 West Freemason Street, Norfolk, Virginia.

Q. How long have you been employed there?

A. A year.

Q. What is your position there?

A. I do some stenographic work and also bookkeeping.

Q. In connection with the bookkeeping which you do, will you describe your duties?

A. Well, I make up vouchers for bills which are to be paid and I also help with the payroll and I work in the cash disbursements and cash receipts and general journal.

Q. Will you state whether or not any of the bills to be paid are to out of State firms?

A. Yes, sir, they are.

Q. Does your payroll work concern employees of the Washington office as well as the Norfolk office?

A. Yes, sir; it does.

Q. Does it pertain to any employees of Lublin, McGaughy and Associates outside of the United States?

A. Yes, sir.

Q. Approximately how many employees outside of the United States are included?

A. I would say around fifteen or twenty.

Q. Where are they located?

A. We have several around, I guess you would say around Paris—they are in France. And then there is not but around three in the Milano office in Italy.

Q. Do you prepare any checks for payment of those employees in Europe?

A. Yes, sir.

Q. What do you do with those checks, if anything?

A. Well, I usually write the check and as I write the check it records on the pay journal and on their individual record.

Q. Do you transmit those checks to any points and, if so, where?

A. I mail some of their checks to banks in the United States and then some of them are mailed directly to them overseas.

Q. To those banks in the United States, are those banks located outside of the State of Virginia?

A. Some of them; yes, sir.



Page

Q. Are there any other checks in addition to the pay checks that you send outside the State of Virginia?

A. Yes, sir. When I pay the bills, some of them are sent outside.

Q. I have in mind expense and travel checks for these employees in addition to their salary checks.

A. Yes, sir; some of those are sent outside the United States.

Q. Do you prepare any sort of accounting records with regard to the expenses of the Washington office and the offices in Europe?

A. Yes, sir; I do.

Q. What type of accounting records?

A. Well, I do expense analysis each month which shows the expenses proportionately among all the offices, that they spend during the month.

91 Q. Would those expenses include labor, travel, per diem and supplies in those offices?

A. Yes, sir.

Mr. NUSBAUM. The question is a little bit leading.

The COURT. That is all right. Let's go on. I think this lady will get the answers through quicker.

By Mr. TINCER:

Q. Do you have anything to do with specifications that are prepared in the Norfolk office?

A. Yes, sir; I do.

Q. What is your work there?

A. I type specifications if the need arises.

Mr. HOFHEIMER. You may stand aside.

Mr. TINCER. If your Honor please, we had an understanding with counsel for defendants that the next witness which we would call could be left in the office until she was called. Now, if we can agree that her testimony——

The COURT. Wouldn't her testimony be substantially the same as this other lady?

Mr. TINCER. Except for the bookkeeping.

Mr. HOFHEIMER. She writes letters out of the State.

The COURT. No question about that. I am going to take judicial notice of that. These defendants couldn't operate without writing letters out of the State, and a substantial number of letters out of the State. If that is all you want to prove by that lady, let's stipulate to that right now; that they are written, and presumably signed, and that she mails them, if you want to.

Mr. NUSBAUM. Further stipulate that she also types specifications, Judge.

Mr. TINCER. With those stipulations then, we will waive the calling of that witness.

The COURT. Fine.

Mr. TINCER. With the further understanding, that is her regular duty and that that is what she is paid to do.

The COURT. I assume there is no question about that. Those are her regular duties, that is what she is paid to do, there are no jokers in it.

Mr. TINCER. Now, if your Honor please, that concludes the employee witnesses. We would like to resume with Mr. McGaughy.

JOHN B. MCGAUGHY, resumed.

Direct examination continued by Mr. TINCER:

Q. Projects No. 907 and 908 I believe are related, are they not, Mr. McGaughy?

93

A. No; they are not related.

Q. The 907 relates to a building which apparently is abbreviated. Would you tell us what that building is, the type of building?

A. I am sorry, I can't; 907 and 908 are comparatively small projects. I am not very familiar with them and I am not in a position to testify about them, frankly.

Q. Do you know where they are located?

A. I think they are located in Washington, D. C.

Q. In the District of Columbia?

A. I think so.

Q. Are they being handled by the Washington office of your firm?

Page

A. As far as I know they have been handled and have been completed. As I say, they are comparatively small projects, both of them.

Q. Turning over to No. 844, proposed office building, Baltimore, Maryland. Do you know whether any plans and specifications were prepared?

A. No; they never got past the preliminary stages on these deals where the financing didn't materialize as was hoped by the owners and that was the end of it.

Q. Were any preliminary drawings made in connection with that project?

94 A. Some preliminary sketches were made of that building and that is about all that was done on it.

Q. I assume those preliminary sketches were given to or transmitted to the owner in Baltimore, Maryland; would that be correct?

A. I don't think they were. I think the owners were in Washington, as I recall that particular project. It has been some time back now but I think the owners of that were Washington people.

Q. Could you tell me in project No. 859 whether plans and specifications were prepared?

A. I don't remember it very well but I am pretty sure they were prepared in Washington. I think actually that was a job where we merely wrote the specification to expedite the getting of this project under the wire for the fiscal year. The Navy I think prepared their own plans and they didn't have the necessary technical people to get the specification out in time. As a favor to them we wrote the spec.

Q. You were paid for that I assume?

A. Oh, yes.

Q. And they related to this structure to be located at Indian Head, Maryland?

A. Yes; I assume so.

Q. No. 866, Fort Meade post engineer's office, a budget drawing, would you describe the nature of that?



A. Budget drawing is a drawing used by the armed services which is fine-screened and, as I understand, it is sent to Congress whereby they ask for certain funds.

Q. Where was the work done on that project by your office?

A. That project I think was done in Norfolk.

Q. Would it be correct to say that in its final form it was typed up by your Norfolk office employees?

A. I am not sure there was any typing involved in that particular project frankly. A budget drawing is a single line drawing which is used to put certain very basic criteria on it and a very general cost estimate, all of which is normally placed on the face of the drawing itself. Whether it was a letter of transmittal, whether it was delivered by hand, I don't recall. For instance, a project like that there is no written specification goes with it.

Q. The drawings would have been made by your employees?

A. That is right; yes.

Q. No. 870, Marine Corps school, Quantico. I assume that was similar to Project No. 906, is that correct?

A. No; that is, 870 is the plans for 100-man messing galley, which was prepared by our office in Washington.

Q. The work on that was done in the Washington office?

A. Yes.

Q. And I assume it was done in the same manner to the extent that preliminary drawings would be passed on by the Navy Department and then the final plans would be submitted to them?

A. Yes; I think so.

Q. And it related to a project to be constructed at Quantico, Virginia?

A. Actually, the Government I don't think has constructed the project. I think they dropped it after the plans were completed.

Q. That is what it related to at the time you were preparing plans and specifications?

A. Yes.

Q. Just one or two others, Mr. McGaughy, and I don't be-

lieve these are listed on the job list you have. But do you recall the project in connection with a Trailway bus terminal located in Baltimore, Maryland, which your firm did?

A. Yes.

Q. And the Trailways Terminal at Washington, D. C.?

A. Yes.

Q. The one at Washington, D. C., was a very substantial project, was it not?

A. The one at Washington was a new project. It had never been used for a bus terminal before. It was designed to provide a new bus terminal. And the one at Baltimore, which was done about five or six years ago, as I recall, was a small remodeling job.

97

Q. This one in the District of Columbia which you said was a new terminal was to be used in place of the terminal the Trailways were operating at the time, wasn't it?

A. That is right.

Mr. NUSBAUM. We object to the relevancy of any work that was done five or six years ago as not being the period under contemplation in the complaint, the stipulation, or any of the papers in the trial.

Mr. TINCER. My next question, if the Court please, will show the relevancy of the defendant's answer.

The COURT. All right.

By Mr. TINCER:

Q. You expect, Mr. McGaughy, in your business to take that type of work in the future if it comes along, do you not?

Mr. HOFHEIMER. Object to that, your Honor.

The COURT. Objection overruled. I think what he intends to do might be pertinent.

A. I would assume that if such a project as that came along today, we would accept it. There hasn't been offered one recently. I don't know.

98

Mr. TINCER. If your Honor please, we have here time sheets which have been produced in response to a subpoena duces tecum and the Wage Hour investigator has separated from all of the sheets only those relating to draftsmen, stenog-

raphers and field men for the period October 1 through March 31, and these relate only to the Norfolk office. I wish to offer these in evidence.

The COURT. Mr. Hofheimer and Mr. Nusbaum had an opportunity to see them?

Mr. TINCER. I assume that they have, your Honor.

The COURT. Have you seen them, gentlemen?

Mr. HOFHEIMER. This is for the draftsmen, the stenographers, for the period covered by the complaint, is that correct? Draftsmen, stenographers and field men?

Mr. TINCER. That was the period October 1st of 1955 to March 31st of 1956.

Mr. HOFHEIMER. These records were prepared by us, is that correct?

Mr. TINCER. That is correct.

Mr. HOFHEIMER. And were a part of our office files?

Mr. TINCER. That is correct.

Mr. HOFHEIMER. Is it your opinion to remove them from the file and leave them from it? We don't agree to that. We are perfectly willing for you to have them.

Mr. TINCER. They do need to be put in evidence, your Honor. We have no objection to photostat copies being substituted for these records.

Mr. HOFHEIMER. If your Honor please, of course these were produced subject to a subpoena duces tecum. Here they are. If they are kept in the files of this case, if the Government wants copies, they ought to have them photostated.

The COURT. Yes.

(There ensued discussion between Court and counsel, after which the following proceedings were had:)

Mr. TINCER. We do wish to have these admitted and marked with the understanding that copies or facsimiles can be substituted for them.

Now, if the Court please, not all the records that we need are here. This is the biggest part of them but Mr. Hammons has not had time, didn't have access really, to the others.

The COURT. The Washington records?



Mr. TINCER. That is right. To pick them out.

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The COURT. They can be introduced in the same manner, copies made of them and introduced in the same manner by stipulation?

Mr. HOFHEIMER. That is correct.

The COURT. It is a nonjury matter.

Mr. HOFHEIMER. Your Honor, there is one point in regard to these. These, of course, have been selected for designation by Mr. Hammons who is the government investigator. We don't know that these—for instance, in that respect Mr. Tincer has said that he has here the records of all our field men, stenographers and draftsmen. We don't know that these are the records of the field men, draftsmen and stenographers. We assume that they are but we would like to reserve the right if we can pick out someone and say, "This person is an executive, this person is an administrative employee, or this person is a professional engineer." We want to have the right to have it excluded.

101

The COURT. Under Mr. Tincer's representation from his field man that these consist only of draftsmen, stenographers and field men, under that representation the exhibits will be introduced in evidence as one exhibit, Government's Exhibit No. 5, with the right of counsel for either side to inspect the same and the requirement of the Government to either elect to have them photostated and the photostats substituted in lieu thereof or that they be copied in some manner and the copies exhibited to Mr. Hofheimer and Mr. Nusbaum and if found to be correct they would of course then be substituted in lieu of the original.

Mr. TINCER. That will be satisfactory, your Honor.

Mr. HOFHEIMER. And also reserving our right to question the accuracy of the field man's designation.

The COURT. There may be a field man that you say is an engineer?

Mr. HOFHEIMER. That is right. Certainly he wouldn't be covered.

The COURT. You wish to reserve that right in going through

them to determine that. That is a job that Mr. McGaughy can do probably by running through there in five minutes time and determine that.

Now, of course, the Government also reserves the right to introduce in evidence the same record with respect to the Washington [office] of the defendant.

Mr. HOFHEIMER. Subject to the same reservations.

The COURT. Same reservations and so forth and that they may be introduced at a later time even after the conclusion of any examination of any more witnesses.

Gentlemen, the hour is two o'clock. In line with the Court's statement I think it is perhaps best to recess at this time.

(Thereupon, an adjournment was taken until the following morning, June 7, 1956, at 10:00 a. m.)

NORFOLK, VA., June 7, 1956.

(The Court reconvened at 10:00 o'clock a. m.)

Appearances: As previously noted.

The COURT. You gentlemen ready to proceed in Civil Action No. 2070, Mitchell, Secretary of Labor against Lublin and McGaughy?

Mr. TINCHER. Yes, your Honor. At this time we have the remainder of the records. These records pertain to the Washington office employees of the defendant, which can be incorporated as Plaintiff's Exhibit No. 5 with those for the Norfolk office employees.

The COURT. That will be fine. Subject to the same situation with respect to withdrawal.

Mr. HOFHEIMER. Your Honor please, we of course have no grounds for objection to the introduction of these papers, these files, and we put them in with the reservation that your Honor has just announced. On the other hand, we do want to reserve the right when we put on our case to show by evidence submitted before the Court that these men are not—not all of them, but some of them are men who are professional or executive under the Act. In other words, we don't admit that those thirteen men from the Norfolk office are nothing but draftsmen and field men.

Page

The COURT. Let me ask you gentlemen this question: Would you like to go into that phase of it at this time? Or would you rather the Court rule on the basic question first and then reserve for further determination who is and who is not under the Act as far as the individual employee? Some of them unquestionably are.

Mr. HOFHEIMER. It seems that would be the better procedure.

104 The COURT. It makes no difference to me. It depends upon what you gentlemen would like to do. The difficulty is, I had in mind we have a basic issue we must determine which I think is going to come down to the same basic issue you stated right in the stipulation. Now, I don't think it is contended by you, is it, Mr. Hofheimer, that if the Fair Labor Standards Act is sufficiently broad to cover the business of an architect and consulting engineer such as Lublin, McGaughy in the manner in which they operate—if it is sufficiently broad there are bound to be some employees that are under there.

Mr. HOFHEIMER. That is correct.

The COURT. Who they are, whether they are John Jones or Susie Smith, I don't think is particularly pertinent because the Government might not be in a position right at this time to particularly contradict any testimony that might come up as to such and such an employee and they may wish to investigate it further.

105 Mr. RAY. If the Court please, to me it appears that we are going into a field which is not particularly pertinent in regard to whether or not certain employees may or may not be exempt. In the first place, no exemption is pleaded. And I don't think it makes any real difference on the basic issue. What we must establish, and what I was hoping that counsel would concede, that some employees in all these various categories, stenographer, drafting, and field employees, have worked more than forty hours a week and have not been paid overtime compensation. And there is a further refinement on that point in that regard to employees who have worked on plans and specifications and perhaps other items of that kind, as the record may



show, have worked more than forty hours in certain weeks and not been paid overtime compensation. Whether or not in addition to that professional employees have worked on it is not particularly material. We are after an injunction under which the defendant would be protected against a claim of violation if in effect the particular employee is exempt as professional employees.

Now, I proposed to Mr. Hofheimer, either in lieu of this Government's Exhibit 5, we enter a stipulation somewhat in the language which I stated here, and, if so, that would certainly save a lot of detail evidence and we wish certainly to avoid that.

The COURT. For instance, there was one young man testified here yesterday—he was in the field group—he said he unquestionably had worked more than forty hours, and what he received by way of pay is, I think, pretty much a matter of record. Now, if he comes within the Act—and I don't suggest that he does and I don't suggest that he doesn't—but if he comes within the Act, he and all people like him would fall within the Act. Isn't that true?

Mr. RAY. That is true.

Mr. NUSBAUM. That is already in the record, your Honor.

Mr. RAY. That is in regard to one employee. But these records show that all employees, he and all employees similarly situated—it has got actually what jobs they worked on. It all ties in. So that this Exhibit 5 which has just been introduced will simply show what jobs, who worked on those jobs and on plans and specifications, which the record shows went out of the State of Virginia or out of the District of Columbia. Some of those employees in those various categories did work more than forty hours a week without extra pay. That is all we are after.

Mr. HOFHEIMER. No question as to that.

The COURT. I think you gentlemen will agree as to that, there were some employees; who they were and so forth I don't think is particularly pertinent.

Mr. HOFHEIMER. The only thing we wanted to say, if we

are covered by the Act in any phase of our activity, and we don't believe we are, we don't believe all the men whose cards are here are covered.

Mr. RAY. We don't concede that they are all necessarily covered. We concede a——

The COURT. I think we can take that matter up later on if necessary. There is no need to go into evidence as to each particular employee at this particular time. I am confident if the Court rules they are within the Act then you and Mr. Hofheimer could probably agree on nine out of every ten.

Mr. RAY. I am sure we could. It is almost a mathematical proposition. I might add one other thing: If counsel does see fit to stipulate substantially as I have indicated, then we would ask leave to withdraw Government's Exhibit No. 5 because it would simply clutter up the record. That is all we can show: names, jobs, and hours from it.

Mr. HOFHEIMER. What we will stipulate is this, if this will suit the Labor Department: that undoubtedly some of our draftsmen and some of our field men have worked more than forty hours a week without getting time and a half for the excess hours over forty hours a week on some plans and specifications, or on some jobs.

108 The COURT. How about the stenographers?

Mr. HOFHEIMER. The stenographers, I think some of them. As a general thing our stenographers don't. The girl from Washington testified she didn't work over forty hours.

The COURT. She did once.

Mr. RAY. We have got records to show, although she worked only a short time, in one week she worked 47 hours and one week 48 hours.

Mr. HOFHEIMER. And that she wrote letters out of the District and out of the State, we will admit that.

The COURT. I think it is a fair statement to say that counsel could stipulate that unquestionably the employees of Lublin, McGaughy in the classification of what is known as field men, in the classification of what is known as draftsmen, in the classification of what is known as stenographers, who from

time to time and with some degree of regularity did work in excess of forty hours per week, were not paid time and a half for that overtime.

Mr. HOFHEIMER. Yes, sir. I think that is in the written stipulation.

The COURT. If that is the case, I think we probably could withdraw that exhibit, could we not?

Mr. RAY. The only additional thing is the connection of these employees, which I take it is also included in the stipulation offered. It relates that these employees worked on plans and specifications which this record shows actually went outside the State, either Virginia or the District of Columbia, work of some kind.

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The COURT. Some might have worked on one plan and some on another, but generally they worked on plans and specifications that ultimately, some of them went out of the State.

Mr. HOFHEIMER. That was testified to yesterday by our own witness.

Mr. RAY. With that understanding then, we would ask leave of the Court to withdraw Government's Exhibit No. 5:

The COURT. That will save you the trouble of substituting copies. Let them be returned to Lublin, McGaughy, Government's Exhibit No. 5, with the understanding of course they could be produced at a later time for such examination as may be proper, depending upon the Court's ruling.

The COURT. I believe Mr. McGaughy was on the stand and you gentlemen wished to ask him some questions; is that correct?

Mr. NUSBAUM. Not at this time.

110

In connection with that stipulation, can the record show that the field men don't work directly on the plans and specifications but only gather data which is incorporated therein?

Mr. RAY. That is correct.

The COURT. That was testified to yesterday; that they come in and they go over it with a plotter, I believe, and give him information with respect to it.

Mr. HOFHEIMER. If your Honor please, we have no wish to



cross-examine Mr. McGaughy. Of course, we would like when we put on our own evidence to reserve the right to put him on the stand as our witness.

Mr. TINCER. If the Court please, we have one additional witness, Dean Earle B. Norris, who will be called as an expert.

EARLE B. NORRIS, sworn.

Mr. TINCER. If the Court please, we have a statement of qualifications of this witness which I have shown to opposing counsel. We would ask leave to file this statement as a part of the witness's testimony subject to any cross-examination desired by opposing counsel, in order to save time.

The COURT. Is that satisfactory, gentlemen? I don't know the purpose of it.

Mr. HOFHEIMER. Proceed.

(The statement referred to is copied into the record as follows:)

STATEMENT OF QUALIFICATIONS OF EARLE B. NORRIS,  
B. S., M. E.

I have a Bachelor of Science Degree in Mechanical Engineering and a Professional Degree of Mechanical Engineer, both from Pennsylvania State University. I served as Dean of the Engineering School of the University of Montana from 1919 to 1928. I served as Dean of the School of Engineering and Architecture at Virginia Polytechnic Institute from 1928 to 1952. I am presently Dean Emeritus of the latter institution. I am registered as a Professional Mechanical Engineer in the State of Virginia and, presently am self-employed serving as Consulting Engineer in various individual employments.

Among the professional consulting activities in which I have engaged, outside the academic field, may be included a Garbage and Refuse Collection System, and an Economic Study of Garbage Incinerator, both for the City of Milwaukee, and for Lynchburg Foundry Company, consultant in failure of water supply pipelines. While an officer in the United States Army, I

served during 1919 as Chief Engineer of Rock Island Arsenal. While on active duty with the U. S. Army Reserve, I did research on gun construction at Watertown Arsenal during 1926 and 1927. Also while on active duty in the U. S. Army Reserve, I performed research on a high speed impact testing machine at Watertown Arsenal in 1934.

While Dean of the School of Engineering and Architecture at Virginia Polytechnic Institute, I had the following departments of engineering and architecture, among others, under my direction: Architecture; Civil Engineering (including Sanitary Engineering); Electrical Engineering; and Mechanical Engineering.

As Dean charged with the correlation of the work of the several departments, I probably acquired a better understanding of the inter-relationship of these fields of engineering than would normally be expected of a specialist in a single phase of engineering.

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During the period from 1930 to 1952, I served as a member of the Building Committee at Virginia Polytechnic Institute. In this position, I had the responsibility for reviewing numerous plans and specifications submitted by architects and engineers in connection with various structures that were erected on the campus. Among such structures were Randolph Hall, a mechanical engineering building which cost roughly \$1,000,000.00 to construct; Holden Hall, a classroom and laboratory building; Patton Hall, an administration and classroom building; and a college power plant. My work in this connection included meeting with architects and engineers to check preliminary drawings and sketches, suggest changes and advise the building committee with reference to acceptance of final plans and specifications. It was my experience in connection with the above buildings that it was usually necessary to go over preliminary sketches and drawings on three or four separate occasions with the architects and engineers before final plans could be approved.

In addition to my consulting and academic experience, I am the principal author, jointly with others, of the following books: Shop Arithmetic, Norris & Smith; Advanced Shop Mathematics, Norris & Craig; Gas Engine Ignition, Norris, Winning & Weaver; Heat Power, Norris & Therkelsen; Applied Thermodynamics, Norris, Therkelsen & Trent.

All of the above books have been published by McGraw-Hill Book Company, New York City.

(S) Earle B. Norris

EARLE B. NORRIS, B. S., M. E.

Direct Examination by Mr. TINCHER:

Q. Will you state your name, please, sir.

A. Earle B. Norris.

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Q. Dean Norris, from your professional training and experience as outlined in your statement of qualifications, can you tell the Court what is the utility value of plans and specifications in the construction of a building?

A. Certainly it is a most important part and a part which a pretty considerable portion of the architect's fee is paid in that it serves three purposes. In the first place, the plans and specifications serve as the guide to prospective bidders in arriving at their estimates of the cost and what they think they are able to do the work for. In a good many cases it is necessary to get a building permit and the plans and specifications would be necessarily shown to a building inspector, building commissioner, or whatever he may be called, in order to be sure that the requirements of the building codes have been met. And then furthermore, assuming that the work progresses and the contract is let, it becomes a guide to the contractor in carrying out the work, in purchasing his materials, organizing his labor and scheduling the work.

The COURT. In substance, Dean, you can't build anything other than a boy's shack out in the backyard short of having plans and specifications?

The WITNESS. Not in the present day, you can't.



By Mr. TINCHER:

Q. Dean Norris, to what extent would you say that plans and specifications are the product for which the owner pays the architect?

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Mr. HOFHEIMER. If your Honor please, now I object to that question the way it is framed. I think it is leading. He is telling the Dean it is a product. We think it isn't a product. I think if he is going to conduct an examination of the Dean—although I think we can admit everything that the Dean will say that is relevant—I don't think he should do it in that manner. We are not calling upon the Dean for a conclusion of law. There isn't anything in the Dean's qualifications that leads us to believe he is qualified for that.

The COURT. Are you getting around to asking the Dean ultimately, Mr. Tinchler, whether or not in his opinion plans constitute goods and whether or not it constitutes work product under the Fair Labor Standards Act?

Mr. TINCHER. I am not, your Honor. That is not my intention. I think that would be invading the province of the Court. But this question is asking simply whether they are the product which the owner is paying the architect for.

The COURT. I think that is admissible.

By Mr. TINCHER:

Q. The Court says you may answer the question.

(The last question was read by the reporter.)

115

A. Usually the contract between the owner and the architect or engineer divides the payments into three categories: First, the preliminary studies, preliminary estimates of cost, for which—well, usually somewhere around 25 per cent of the total fee is paid. Now, then, when you come to the plans and specifications, that represents the major part—I'd say at least 50 per cent of the contribution of the architect on the whole job. And it involves, of course, services of all of the draftsmen, field men to whatever extent they are included, stenographers, generally it also includes, should include, indirect expense or overhead of the office, the entire organization, and

Page

a reasonable return to the architect or engineer for his professional services. So it's a good part of it, up to that time.

Q. Now, is there another stage in the work of the architect that you have not touched upon?

A. The third phase, assuming that bids are received which are acceptable and the contract is entered into, in a great majority of cases probably the architect also supervises the construction with the guidance of the plans and specifications to see that the work is done as planned, with proper materials, the proper labor, and that the plans are carried out, and for that, it's roughly about another 25 per cent of the total fee involved on the job.

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By the Court:

Q. Dean, when they supervise the construction, am I reasonably correct in this statement, that what they generally designate then is a project manager to go to the job and he is the architect's representative or the consulting engineer's representative on the job. He must be there in the event there are any changes and so forth, issue a change-order, if necessary, He is the man with whom the contractor must clear?

A. Contractor must clear with him.

Q. Before they get any work approved or disapproved as the case may be?

A. Yes; that is right.

Q. That of necessity would require a highly trained man, would it not, to occupy a supervisory position? For instance, you wouldn't send a draftsman or a secretary or a field man for that type work?

A. No; indeed you wouldn't. A man with considerable construction experience in that sort of work.

Q. Now, do they ever send secretaries with that so-called project manager, or, if there is any secretarial help, is that generally supplied under the contract from the contractor himself?

A. No; I would think that your inspector in charge would provide what secretarial work was needed as a part of that fee for supervision. I wouldn't think the contractor would

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provide it. It may be a very small item, in which case they might.

Q. Suppose there were any necessary change in the plans during the course of construction, would the contractor ordinarily incur that expense or the owner or would that drop on the consulting engineer?

A. That is the owner's responsibility. He is the man that pays for changes.

Q. They always put it on him, anyway?

A. Yes.

Q. What I am trying to get at—of course, this would not necessarily be limited to Lublin, McGaughy; I am speaking now generally—you know of instances where draftsmen have gone on the job from the firm of the consulting engineer, as well as, of course, a highly trained professional man that he puts there?

A. Mostly that work would be done in the office of the engineer-architect, if there are drawings involved and changes. It wouldn't be done on the job very likely.

By Mr. TINCHER:

Q. Dean Norris, it has been stipulated that approximately 50 percent of the business done by Lublin, McGaughy for nongovernment clients no supervision is rendered by the architectural firm. Could you state generally what portion of the fee paid by the owner where no supervision is contracted for is paid by the owner for the plans and specifications which the architect furnishes?

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Mr. HOFHEIMER. If your Honor please, I object to that. We testified as to what our rate was for supervision and what our rate was for drawing plans and specifications without supervision. Mr. McGaughy, their witness, testified to that. Now, what is generally charged hasn't anything to do with this and I don't believe that the witness can answer that question, anyhow.

The COURT. For instance, a standard in the field. There may be a standard in the field, I don't know.



Page **Mr. HOFHEIMER.** That hasn't been established yet by the Government.

**The COURT.** Suppose you ask him whether there has ever been any standard accepted in the field.

What the gentleman is after, Dean, where there is no supervision, he wants to know whether there has been any standard accepted allocation in the field of architects and consulting engineers as between the drawing the plans and specifications and the preliminary work—if there has been any standard. If there hasn't been a standard accepted in the field, I would

119 rather you would not testify to that.

**The WITNESS.** I think that is a matter of individual negotiation in each case.

**By Mr. TINCER:**

**Q.** To clarify your answer previously given, Dean, where the preliminary studies, the plans and specifications and the supervision, where all three stages are involved, was it your testimony that roughly 50 per cent of the charge to the owner was for the plans and specifications?

**A.** Of course that may vary according to the contract and the job, but that is as near as you could arrive at a rough estimate, an average.

**Q.** Dean, are the plans and specifications provided to the owner by the architect in any sense an end product for which the owner pays the architect?

**Mr. HOFHEIMER.** If your Honor please, I object to that, again on the same ground. He has used the word "product" to try to bring it under the Act.

**The COURT.** I sustain the objection. I am not going to let the Dean testify as to what is meant by the word "product" or what is meant by the word "goods." It is a legal conclusion there, is it not?

**Mr. TINCER.** That is not the purpose of the question.

120 **The COURT.** What do you mean by "end product?" What do you mean?

**Mr. TINCER.** I mean the last stage in the work furnished

by the architect to the owner. The last stage, that is the end of the relationship between the architect and the owner.

The COURT. You just ask him that in plain, ordinary, everyday English language and leave out that word "product" and "goods" all the way throughout.

By Mr. TINCHER:

Q. I will rephrase the question, Dean. Are there cases in which the plans and specifications furnished to the owner by the architect are the end stage of the work done by the architect for the owner?

A. Oh, certainly there are.

Q. Would you describe those?

A. Well, he may, after receiving bids from contractors, he may decide that he can't finance the thing or that the cost is going to be prohibitive and they just agree to call it quits at that point.

Q. Any other situations where a similar result would obtain?

A. Well, Mr. McGaughy testified yesterday a number of cases where doing work for the Government they—I think their work ended when the plans and specifications were submitted.

Q. I wanted to confine this particular question to non-governmental clients. Would another situation be where—

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Mr. HOFHEIMER. I object, your Honor. He has asked him if he knew any others and the witness said no. This is a leading question. I don't know what it is going to be but it is bound to be leading from the way he started off.

The COURT. I am afraid it is. If the Dean can't think of the answer, the end stage has been reached. Isn't that true, Mr. Tinchler?

Mr. TINCHER. I am afraid it has, your Honor. I think he has already covered it in his testimony.

The COURT. I think so.

By Mr. TINCHER:

Q. Dean Norris, could you tell the Court whether the copies of specifications and the prints of the drawings and plans which are furnished by the architect to a nongovernment owner have any intrinsic value of their own?

Mr. HOFHEIMER. I object to that, your Honor.

Q. (Continuing.) And, if so, would you explain what that value is.

The COURT. What do you mean by the word "intrinsic" value?

Mr. TINCER. The word is defined in the dictionary as "genuine" or "real." And that is the only sense in which I use it.

122 The COURT. Why don't you just use the word "value"?

Mr. TINCER. That is satisfactory.

Q. You recall the question? Just omitting the word "intrinsic," what value do the prints of the plans and the copies of the specifications have?

A. Well, they represent a considerable effort on the part of the architect-engineer and his staff; involve all the services, not only his professional men but the draftsmen, instrument men, stenographers and typists. They have a considerable real value, as far as that job is concerned at that stage; that status at that time.

Q. Can you enumerate any other values in reference to the cost of producing the prints by a blueprint establishment?

A. Well, naturally all the costs of reproduction are paid for by the owner as part of the fee that he pays the architect for that particular phase of the work. Some architects have their own blueprinting establishment and some send the work out to a commercial blueprinting firm. The same thing might be true of mimeographing or multigraphing of copies of specifications. There is a considerable value involved, in what is being paid for it.

123 Q. Your statement of qualifications indicates that you spent a good part of your professional life in the academic field. Do plans and specifications, prints thereof, and copies thereof, have any value in the educational field?

A. Oh, yes; indeed. Particularly in departments of structural engineering and departments of architecture, it is quite common after a job has been completed the architect will say, here are a number of copies of the plans and specifications



left over on his hands. They just accumulate dead storage place if he kept them. And it's a practice of a good many architects, if they have done something that they are particularly proud of, to give to our department of architecture a set of plans and specifications, or sometimes more than one set. They of course also have a value to the owner after the job is completed, because he may be faced later on with questions of alterations. He wants to take a wall out; he wants to know whether it is a bearing wall or a curtain wall. He may have problems of repair, replacement of steam lines, or electric services. He wants to know where things are; where they come from and where they go to. So all of those things are shown on the plans. So every owner should keep a set of those for future reference in case of repairs, first—alterations.

Q. Just to amplify a bit on the uses to which a college of engineering would have for these plans—

Mr. NUSBAUM. Your Honor, I object to this line of testimony. I don't see it does any more than build up the record. There is no evidence as to what we do with our plans.

124

The COURT. I don't think the Dean's testimony has in any way yet been in conflict with Mr. McGaughy's. But if they want the testimony in—he is an expert in the field—I don't see any harm in it. I suspect that probably the Government somewhere down the line has been cracked in the teeth by failure to prove something in one of these cases and maybe that is the reason Mr. Tinch and Mr. Ray are very anxious to get the record as complete as possible. I think the issue is coming down to the one basic issue. But I have concluded that I am just not going to take the arbitrary stand to stop them. If they feel that somewhere down the line there has been some loophole that they have to plug—certainly the Dean's testimony has not hurt the defense thus far. I don't think you all disagree with it in any way.

Mr. HOFHEIMER. If your Honor please, along the line of the last five minutes of the Dean's answer, now here is the stipulation: "At the completion of any nongovernment project a final copy of the blueprints is often kept by the client for

Page

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his future reference and convenience in making repairs." I submit that has been nothing in the world but the Dean saying that a number of times and I just don't see any reason to go on with the same thing.

The COURT. I can't stop the Dean because the Department of Labor might not want to pay him his fee for testifying here.

Mr. TINCHER. The questions are simply to establish some factual basis with reference to value, if any, which these prints have. The dean mentioned that they are given to the engineering college of a school and I am asking now what the engineering college would use them for.

A. Well, naturally, all of our instructions to students are aimed to acquaint them with prevailing practices at the time. And the more we have creditable work of architects and engineers which can be shown to the students and studied by them, the more conversant they are with how things are done. So that those do constitute a considerable part of the library facilities in our department of architecture.

Q. And in your academic experience did you find that prints of that type had value in connection with the instruction of the students?

126

A. Oh, yes; indeed. There are so many fields of importance in engineering education, and yet in which the numbers of students in the country as a whole is so comparatively small that there are not textbooks available. You have to depend on things of this sort in a good many fields.

Q. We have been confining the questions and your answers largely to nongovernment type owners. Now I would like to ask you whether the plans and specifications which an architect will furnish to a government client, Department of the Army or the Navy or Housing Authority, have value and, if so, what that value would be.

A. Well, I think there we would have to go back pretty largely to Mr. McGaughy's own statements as far as his stock plans, if you want to call them that, which they prepare and turn over to the Government and which become standards.

Q. From your experience could you tell the Court whether

the Government would have to spend more to have new plans prepared for a structure than it does for having standard plans adapted to a particular site?

Mr. HOFHEIMER. Object to that question, your Honor. I don't think that is relevant. It hasn't anything to do with whether or not this firm was under the Fair Labor Standards Act, whether or not the Government would have to pay more to have the plans drawn another way than they do to have them drawn this way.

The COURT. I don't see how in the world, Mr. Tincher—that has gone far afield. I sustain the objection. Because unless he knows about the few standard plans, the one Mr. McGaughy described, something about a warehouse, I don't see where it would be relevant at all.

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Mr. TINCHER. If the Court please, we would like to have this statement of qualifications copied into the record rather than made a physical exhibit.

128

The COURT. In that case, let's not introduce it as an exhibit. Just hand it to Mrs. Romig, the court reporter, and let her retain it for her information.

129

Mr. RAY. May it please the Court, we are about to rest, but I have a document here which might be helpful, which I will show to counsel. It is a certified copy of certain data from the Bureau of Labor Statistics of the United States Department of Labor which indicates and has bearing on the extent to which blueprints are necessary in connection with construction industry, and it is purely information, I think further enlightenment on cases of this kind.

I might state at this time that in at least seven cases out of ten cases have been bounced back because the Court says we must have a full and complete record in these kind of cases in order to pass on these important questions. And in at least one case the Supreme Court refused to pass on the question—which had a good size record in it, much bigger than in this case—because they said all these different facets, which



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would appear to be monotonous to most of us at least, weren't gone into.

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The COURT. I suspect, Mr. Ray, that the upper courts were ducking the issue, if you want a frank statement right from the bench. I will find they will do that sometimes when they don't want to meet the issue. As far as I am concerned, I would take judicial notice of the fact that plans and specifications are absolutely necessary in the construction field. However, if that is all that proves—

Mr. HOFHEIMER. If your Honor please, I don't know what it proves. It is quite voluminous. It is called "Job Descriptions for the Construction Industry." It is dated July 1936, in five volumes. This is Volume II. It is prepared by the United States Department of Labor, Employment Service. So it is prepared under the auspices of and by the plaintiff in the case. I think it is entirely irrelevant and improper.

The COURT. Suppose you glance through it and we will let the Government rest its case.

Mr. RAY. We ask that it now be identified as Government's Exhibit No. 6 subject to any exception.

The COURT. Suppose it be marked now as Government's Exhibit No. 6 for identification only. Let Mr. Hofheimer and Mr. Nusbaum glance through it.

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Mr. HOFHEIMER. We don't think it is proper as evidence in a case of this kind.

The COURT. I daresay you are right.

Mr. HOFHEIMER. Certainly none of the cases that were remanded, were remanded because that wasn't introduced.

Mr. RAY. Your Honor can take judicial notice. It is here.

The COURT. If the only purpose of that document is to prove that plans and specifications are a necessary adjunct to the construction game, and it needs all that document to prove that, I don't think we have to go any further. Every witness has testified that way. If they didn't testify that way I would look at them with some feeling of distrust. But anyway, Mr. Hofheimer and Mr. Nusbaum can look it through and see what purpose.

Mr. RAY. In order to be as helpful as I can, I might add further it does show as part of the job descriptions of the various crafts that they be able to read these blueprints. I am not saying that is important or not important. I simply bring that out so as to help Court and counsel to understand what these documents reveal in so far as pertinent or possibly pertinent to this case.

The COURT. Is that the plaintiff's case then?

132

Mr. RAY. Yes. I might call attention to the fact that total lapse of time in our case has been the time yesterday, which is part of four hours—

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I certify that the foregoing is a correct transcript of my notes.

/S/ EDNA B. ROMIG,  
Official Reporter.

*Plaintiff's Exhibit No. 1*

DEPARTMENT OF THE NAVY

DISTRICT PUBLIC WORKS OFFICE

AND

OFFICER IN CHARGE OF CONSTRUCTION

FIFTH NAVAL DISTRICT, NAVAL BASE, NORFOLK 11, VA.

In reply refer to: DC-301: HTL: luh L16-1.

31 MAY 1956.

Mr. MARVIN M. TINCER,

*Attorney, U. S. Department of Labor, c/o United States  
Attorney, U. S. P. O. & C. H. Bldg., Norfolk 1, Virginia.*

DEAR SIR: Receipt is acknowledged of your letter dated 24 May 1956, reference *Mitchell v. Lublin McGaughy and Associates*, Civil Action No. 2070.

The following information is furnished in answer to the questions outlined in your letter:

1. Advance planning reports are forwarded to the Bureau of Yards and Docks, Washington, D. C., for review and approval. These constitute less than 50% of the total material prepared for this office during the past two years by Lublin McGaughy and Associates. Plans and specifications are reviewed and approved locally.

2. This office in all cases transmits to the Bureau of Yards and Docks, Washington, D. C., copies of plans and specifications which have been prepared from drawings and stencils prepared for this office by Lublin McGaughy and Associates.

3. No definite figure is available as to the number of cases in which plans and specifications are transmitted to points outside Virginia in connection with obtaining bids, however, plans and specifications may be requested by any out of state contractor who is interested in submitting a bid.

Practically all construction contracts require materials or machinery which would be secured from out of state sup-



pliers, however, we have no way of determining the extent to which contractors order these directly from out of state suppliers.

We trust this information will be of some assistance.

Very truly yours,

(s) W. Sihler,  
W. SIHLER,  
Rear Admiral, CEC, USN,  
District Public Works Officer.

[Receipt stamp]

*Plaintiff's Exhibit No. 2*

CORPS OF ENGINEERS, U. S. ARMY

OFFICE OF THE DISTRICT ENGINEER

NORFOLK DISTRICT

FOOT OF FRONT STREET, NORFOLK 1, VA.

29 MAY 1956.

Address reply to: District Engineer, Norfolk District, Corps of Engineers, P. O. Box 119, Norfolk 1, Va.

Refer to File No.—NAOVL.

Mr. JOHN M. HOLLIS,

*Assistant United States Attorney, Eastern District of Virginia, Norfolk 1, Virginia.*

Subject: *James P. Mitchell, etc. v. Lublin, McGaughy and Associates, et als., Civil Action No. 2070*

DEAR MR. HOLLIS: Reference your letter of 24 May 1956, subject above, *James P. Mitchell, etc. v. Lublin, McGaughy and Associates, et als., Civil Action No. 2070*, please be advised that in substantially all instances copies of preliminary plans, specifications, and analyses of design prepared for this office by the firm of Lublin, McGaughy & Associates, are submitted to the Division Engineer, North Atlantic Division, New York, N. Y., for review and approval.

For most large projects final plans, specifications, and analyses of design are also furnished North Atlantic Division for review and approval. In most cases this office furnishes the Architect Engineer with guide specifications which he marks up for review purposes, and the specifications for final review are submitted to North Atlantic Division in the form of marked drafts rather than specifications reproduced from stencils.

In all cases a set of the final plans and specifications as furnished to prospective bidders are furnished North Atlantic Division for record purposes.

For the District Engineer:

Very truly yours,

WILLIS T. ELLIS,  
(S) Willis T. Ellis,  
Lt. Colonel, Corps of Engineers,  
Executive Officer.

[Dispatch stamp.]

*Plaintiff's Exhibit No. 3*

CORPS OF ENGINEERS, U. S. ARMY

OFFICE OF THE DISTRICT ENGINEER

NORFOLK DISTRICT

FOOT OF FRONT STREET, NORFOLK 1, VA.

5 JUNE 1956.

Address reply to: District Engineer, Norfolk District, Corps of Engineers, P. O. Box 119, Norfolk 1, Va.

Refer to File No. —NAOVL.

Mr. JOHN M. HOLLIS,

*Assistant United States Attorney, Eastern District of Virginia, Norfolk 1, Virginia.*

Subject: *James P. Mitchell, etc. v. Lublin, McGaughy, and Associates, et als., Civil Action No. 2070*

DEAR MR. HOLLIS: The following information is submitted in reply to your request of this date: In connection with a proposed major construction project as distinguished from a

minor repair or addition designed or adapted for us by an architectural firm, including Lublin, McGaughy, and Associates, it is our regular practice to send out an advance notice to approximately 400 general contractors, major subcontractors and suppliers. Such an advance notice always results in requests for sets of plans and specifications from several out-of-state contracting firms. Upon receipt of such requests we generally send sets of plans and specifications to several firms outside the State of Virginia to enable them to prepare and submit bids. The general contractors need more than one set, and at their request we generally send them two or three sets of plans and specifications.

On the Fort Lee Housing Project, for which plans were prepared and adapted by Lublin, McGaughy, and Associates recently, we transmitted by parcel post sets of plans and specifications to approximately 30 contractors and suppliers located outside the State of Virginia. Plans and specifications for that project were quite bulky, and it is estimated that our direct out-of-state shipments of plans and specifications for that one project totalled approximately 494 pounds. It is further estimated that at rates currently charged by Norfolk commercial blue print establishments, the cost of obtaining the number of plans and specifications which our office transmitted to out-of-state contractors in connection with that one Fort Lee Housing Project would have been approximately \$839.00.

The Office of the Chief of Engineers, U. S. Army, is located at Gravelly Point, Virginia.

For the District Engineer:

Very truly yours,

(S) Willis T. Ellis,

WILLIS T. ELLIS,

*Lt. Colonel, Corps of Engineers,*

*Executive Officer.*

[Dispatch stamp.]



## APPENDIX B

### STATUTORY PROVISIONS INVOLVED

#### EXTRACTS FROM PROVISIONS OF FAIR LABOR STANDARDS ACT OF 1938 AND FAIR LABOR STANDARDS AMENDMENTS OF 1949

##### SEC. 3. As used in this Act—

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.

(c) "State" means any State of the United States or the District of Columbia or any Territory or possession of the United States.

\* \* \* \* \*

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State.

\* \* \* \* \*

SEC. 7. (a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a

workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

SEC. 11. \* \* \*

(c) Every employer subject to any provision of this Act or of any order issued under this Act shall make, keep, and preserve such records of the persons employed by him and of the wages, hours and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder.

SEC. 15. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person—

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 6 or section 7, or in violation of any regulation or order of the Administrator issued under section 14; except that no provision of this Act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this Act shall excuse any common carrier from its obligation to accept any goods for transportation; and except that any such transportation, offer, shipment, delivery, or sale of such goods by a purchaser who acquired them in good faith in reliance on written assurance from the producer that the goods were produced in compliance with the requirements of the Act, and who

acquired such goods for value without notice of any such violation, shall not be deemed unlawful;

(2) to violate any of the provisions of section 6 or section 7, or any of the provisions of any regulation or order of the Administrator issued under section 14;

(5) to violate any of the provisions of section 11 (c) or any regulation or order made or continued in effect under the provision of section 11 (d), or to make any statement, report, or record filed or kept pursuant to the provisions of such section or of any regulation or order thereunder, knowing such statement, report, or record to be false in a material respect.

SEC. 17. The district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands shall have jurisdiction, for cause shown, to restrain violations of Section 15: *Provided*, That no court shall have jurisdiction, in any action brought by the Administrator to restrain such violations to order the payment to employees of unpaid minimum wages or unpaid overtime compensation or any additional equal amount as liquidated damages in such action.

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Fair Labor Standards Amendments of 1949 (c. 736, 63 Stat. 910, 29 U. S. C. 201, *et seq.*):

SEC. 16. [63 Stat. 920]:

(c) Any order, regulation, or interpretation of the Administrator of the Wage and Hour Division or of the Secretary of Labor, and any agreement entered into by the Administrator or the Secretary, in effect under the provisions of the Fair Labor Standards Act of 1938, as amended, on the effective date of this Act, shall remain in effect as an order, regulation, interpretation, or agreement of the Administrator or the Secretary, as the case



may be, pursuant to this Act, except to the extent that any such order, regulation, interpretation, or agreement may be inconsistent with the provisions of this Act, or may from time to time be amended, modified, or rescinded by the Administrator or the Secretary, as the case may be, in accordance with the provisions of this Act.

Filed September 26, 1957

In United States District Court for the Eastern District of  
Virginia at Norfolk

Civil Action File No. 2070

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES  
DEPARTMENT OF LABOR, PLAINTIFF

v.

LUBLIN, McGAUGHY AND ASSOCIATES, A COPARTNERSHIP, AND  
ALFRED M. LUBLIN, JOHN B. McGAUGHY, WILLIAM T. MAC-  
MILLAN AND WILLIAM MARSHALL, JR., INDIVIDUALLY AND  
DOING BUSINESS AS LUBLIN, McGAUGHY AND ASSOCIATES,  
DEFENDANTS*Complaint*

Filed September 12, 1955

## I

Plaintiff brings this action to enjoin defendants from violating the provisions of Section 15 (a) (1), 15 (a) (2) and 15 (a) (5) of the Fair Labor Standards Act of 1938, as amended (Act of June 25, 1938, c. 676, 52 Stat. 1060; Act of October 26, 1949, c. 736, 63 Stat. 910; U. S. C. Title 29, Sec. 201, et seq.), hereinafter referred to as the Act.

124

## II

(a) Jurisdiction is conferred upon the court by Section 17 of the Act and by Section 24 (8) of the Judicial Code, revised effective September 1, 1948, U. S. C. Title 28, Sec. 1337.

(b) Under the provisions of Reorganization Plan No. 6, dated March 13, 1950, effective May 24, 1950, issued under the Reorganization Act of 1949, U. S. C. Title 5, Sec. 133 (z), et seq., the functions of the Administrator of the Wage and

Hour Division, United States Department of Labor, under the Fair Labor Standards Act have been transferred to the Secretary of Labor.

### III

Defendant, Lublin, McGaughy and Associates is a copartnership composed of Alfred M. Lublin, John B. McGaughy, William T. McMillan and William Marshall, Jr., all of whom reside in the City of Norfolk, within the jurisdiction of this court. Until on or about April 1, 1955, the said copartnership was composed of Alfred M. Lublin, John B. McGaughy and William T. McMillan. Defendants are, and, with the exception of William Marshall, Jr., at all times hereinafter mentioned were, engaged in providing architectural and consulting engineer services under the name and style of Lublin, McGaughy and Associates, at an establishment and place of business located at 220 West Freemason Street, Norfolk, Virginia, and at a branch establishment and place of business located at 1001 Connecticut Avenue, Washington, D. C. Defendant, William Marshall, Jr., likewise has been so engaged since on or about April 1, 1955.

125

### IV

Defendants regularly have employed and are employing approximately twenty employees in and about their said place of business at 220 West Freemason Street, Norfolk, Virginia, and approximately fourteen employees in and about their said branch establishment and place of business located at 1001 Connecticut Avenue, Washington, D. C.

At all times since on or about October 18, 1952, said employees have been engaged in drafting, preparing, producing and reproducing drawings, blueprints and specifications, for use in the building and construction of military and commercial structures, and in the enlargement, extension and repair of such structures. Substantial quantities of the drawings, blueprints and specifications drafted, prepared, produced and reproduced by these employees have been and are being produced for interstate commerce, within the meaning of the Act, and have been and are being transported, offered for transportation, shipped, delivered and sold in interstate commerce, and have been and are being delivered and sold, with knowledge that shipment, delivery and sale thereof in interstate



commerce is intended from defendants' said places of business to other states, by defendants and their employees. Substantial quantities of the drawings, blueprints and specifications prepared and produced by these employees have been and are being produced for interstate commerce, within the meaning of the Act, in that the said drawings, blueprints and specifications have been and are being used by the purchasers thereof in the enlargement, extension and repair of buildings, terminals and other facilities which are instrumentalities of interstate commerce.

126 At all times since on or about October 18, 1952, said employees have been engaged in receiving, handling, preparing and transmitting payrolls, checks, drafts, work reports, and correspondence have been and are being received and handled in interstate commerce from and through states other than the State of Virginia, and have been and are being prepared, handled and produced for interstate commerce, within the meaning of the Act, and have been and are being delivered, transmitted, transported and offered for transportation in interstate commerce from defendants' said places of business to other states, by defendants and their employees.

By reason of their activities as aforesaid, defendants' employees are engaged in interstate commerce, and in the production of goods for interstate commerce, as defined by the Act.

## V

Since on or about October 18, 1952, defendants repeatedly have violated and are violating the provisions of Sections 7 and 15 (a) (2) of the Act by employing many of their employees in interstate commerce, and in the production of goods for interstate commerce, as aforesaid, for workweeks longer than forty (40) hours without compensating these employees for such excess hours of employment at rates not less than one and one-half times the regular rates at which they are employed.

## VI

On October 21, 1938, the Administrator of the Wage and Hour Division, United States Department of Labor, pursuant to the authority conferred upon him by Section 11 (c)  
127 of the Act, duly issued and promulgated regulations prescribing the records of persons employed and of

wages, hours, and other conditions and practices of employment to be made, kept and preserved by every employer subject to any provisions of the Act. The said regulations, and amendments thereto, were published in the Federal Register and are known as Title 29, Chapter V, Code of Federal Regulations, Part 516.

## VII

Defendants, employers subject to the provisions of the Act, repeatedly have violated and are violating the provisions of Sections 11 (c), and 15 (a) (5) of the Act in that, since October 18, 1952, they have failed to make, keep and preserve adequate and accurate records of their employees, and the wages, hours and other conditions and practices of employment maintained by them as prescribed by the said regulations, in that the records kept by defendants failed to show adequately and accurately, among other things, the occupations, home addresses, date of birth if under 19 years of age, age, hours worked each workday, the total hours worked each workweek, the regular hourly rate of pay, the total daily or weekly straight time earnings or wages and the total weekly overtime excess compensation with respect to many of their employees.

## VIII

Defendants repeatedly have violated, and are violating, the provisions of Section 15 (a) (1) of the Act in that, since October 18, 1952, they have transported, offered for transportation, shipped, delivered and sold, and have delivered  
128 and sold with knowledge that shipment, delivery and sale thereof in interstate commerce is intended from their said place of business to other states, goods in the production of which many of their employees were employed in violation of Section 7 of the Act, as alleged.

## IX

Defendants have, since October 18, 1952, repeatedly violated the aforesaid provisions of the Act. A judgment enjoining and restraining the violations hereinabove alleged is specifically authorized by Section 17 of the Act.

Whereof, cause having been shown, plaintiff prays judgment permanently enjoining and restraining defendants, their

agents, servants, employees, attorneys and all persons acting or claiming to act in their behalf and interest from violating the provisions of Sections 15 (a) (1), (15) (a) (2) and 15 (a) (5) of the Act, and for such other and further relief as may be appropriate.

STUART ROTHMAN,

*Solicitor,*

JETER S. RAY,

*Regional Attorney,*

MARVIN M. TINCHER,

*Attorney,*

*U. S. Department of Labor.*

JOHN M. HOLLIS,

*Assistant U. S. Attorney,*

*Norfolk, Virginia.*

129 Post Office Addresses: Office of the Solicitor, U. S. Department of Labor, 801 Broad Street, Nashville 3, Tennessee, or Office of the Solicitor, U. S. Department of Labor, Washington 25, D. C.

In United States District Court

Cross-examination of EARLE B. NORRIS by Mr. NUSBAUM:

Q. Dean Norris, engineers and architects are professional men, are they not?

A. Yes, sir.

Q. Architects and engineers are professionals?

A. Yes, sir.

Q. And professional men ordinarily characterize what they do as being professional services; isn't that a fair statement?

A. Yes, sir.

Q. So that engineering and architectural firms, consulting engineers and architects are generally engaged in the rendering of service?

A. That is certainly the expression that is used for it generally.

Q. And the services which they render are often rendered in the form of thought and knowledge reduced to plans and specifications, embodied in plans and specifications?

A. Yes.



130 Q. Isn't that the size of it?

A. Correct.

Q. The plans and specifications or copies or prints that you are personally aware of that architects have put at the disposal of your school, they haven't been purchased from those architects? You use the word "give"?

A. They give them to us; yes.

Q. Might it not be reasonably assumed from that fact that they give them to you that they are of no value to them? They are not for sale to you, are they?

A. No. After the job is completed, they are loaded up with them and they want to get rid of them.

Q. If they didn't give them to you the chances are they would throw them away, isn't that true?

A. That is probably true.

Q. When you say that the owner pays a portion of his fee for the plans and specifications, you of course mean what you refer to as the many hours of effort and labor and services presented in the form of those plans and specifications?

A. Surely.

Q. The design, the ideas?

A. Yes; that is all included in it. It has to be.

## In United States District Court

### *Virginia code sections*

"54-17. Definitions.—The following terms, as used in this chapter, shall have the meaning given in this section:

"(1) 'Architect' shall be deemed to cover an architect for an architectural engineer.

131 "(2) 'Professional engineer' shall be deemed to cover a civil engineer, mechanical engineer, electrical engineer, mining engineer, metallurgical engineer or a chemical engineer.

"(3) 'Land surveying' refers only to surveys for the establishment of land boundaries and the subdivision of land and such topographic work as may be incident thereto, the making of plats and maps and the preparing of descriptions of the lands so surveyed or investigated. (1924, p. 356; 1938, p. 496; Michie Code 1942, s. 31451).

"54-18. Board of examiners continued.—The State Board for the Examination and Certification of Architects, Professional Engineers and Land Surveyors is continued. (1920, p. 496; Michie Code 1942, s. 3145a; 1944, p. 265.)

"54-19. Appointment, qualifications and terms of members.—(1) The Board shall be composed of three architects, three professional engineers and three land surveyors to be appointed by the Governor and all vacancies occurring on the Board shall be filled by the Governor.

"54-26. Examinations and issuance of certificates.—The Board shall hold at least one examination each year, in the city of Richmond or at such other place or places as the Board may designate, at such times as it may prescribe by general rule or special order. It shall issue a certificate to practice as a certified professional engineer, a certified architect or a certified land surveyor in this State to every applicant who shall have complied with the requirements of this chapter and the rules of the Board, which certificates shall be  
132 signed by at least four members of the Board. (1920, p. 497; 1924, p. 353; Michie Code 1942, s. 3145c.)

"54-27. Who required to obtain certificate.—In order to safeguard life, health and property, any person practicing or offering to practice as an architect, a professional engineer or land surveyor in this State shall hereafter be required to submit reasonable evidence to the Board that he or she is qualified so to practice, and to be certified as herein provided. It shall be unlawful for any person to practice or to offer to practice the profession of engineering, architecture or land surveying, in this State, or to use in connection with his name, or otherwise assume, use or advertise any title or description tending to convey the impression that he is a professional engineer, architect or land surveyor, unless such person has been duly registered or is exempted under the provisions of this chapter. (1920, p. 498; 1924, p. 354; 1938, p. 494; Michie Code 1942, s. 3145f.)

"54-28. Qualifications of applicants for certificates.—Any citizen of the United States or any person who has declared his intention of becoming such citizen, being at least twenty-one years of age, of good character, and who has had training and experience in architecture, professional engineering or land surveying work which in the opinion of the Board qualifies him to take the examination, may upon the payment



of the fee prescribed in this chapter, apply for a certificate under this chapter; but before receiving such certificate, he shall satisfactorily pass an examination in such professional subjects as may be prescribed by the Board and satisfy it as to his practical experience, general standing and ability. (1920, p. 498; 1924, p. 354; 1938, p. 494; Michie Code 1942, s. 3145g.)

133 "54-33. Grounds for revocation of certificates.—The Board may revoke any certificate after thirty days' notice, with grant of hearing to the holder thereof, if proof satisfactory to the Board be presented in any one or more of the following cases.

"(1) In case it is shown that the certificate was obtained through fraud or misrepresentation.

"(2) In case the holder of the certificate has been found guilty by this Board, or by a court of record, of any fraud or deceit in his professional practice, or has been convicted of a felony.

"(3) In case the holder of the certificate has been found guilty by the Board of gross incompetency or of recklessness in the planning or construction of work.

"(4) In case it is proved to the satisfaction of the Board that the holder of the certificate is an habitual drunkard, or is habitually addicted to the use of morphine, opium, cocaine, or other drug having a similar effect.

"No certificate shall be revoked unless a majority of the members of the Board of the profession involved vote for such revocation. (1920, p. 499; Michie Code 1942, s. 3145j.)

"54-34. Proceedings for revocation.—Proceedings for the revocation of a certificate granted under this chapter shall be begun by filing with the Board written charges against the accused, and the Board shall then fix a time and place for the hearing of such charges. In connection with any such hearing the Board shall have the power to issue subpoenas requiring the attendance of witnesses and the production of records, papers and other documents, and to administer

134 oaths and take testimony thereunder. At the hearing the accused shall have the right to be represented by counsel, to introduce evidence and to examine and cross-examine witnesses. The Board shall make a written report of its findings, which report shall be filed with the Secretary



of the Commonwealth, and which shall be conclusive. (1920, p. 499; 1938, p. 496; Michie Code 1942, s. 3145k.)

"54-35. Issuance of certificates to holders of certificates from other jurisdictions.—The Board may upon application therefor on prescribed form and the payment of a fee of twenty-five dollars, issue a certificate of registration as an architect or as a professional engineer, or as a land surveyor, to any person who holds a like unexpired certificate of registration issued to him by proper authority in the District of Columbia, in any state or territory of the United States, or in any province of Canada, in which the requirements for the registration of architects, professional engineers or land surveyors are of a standard satisfactory to the board; provided, however, that reciprocal privileges be granted to citizens of this State. (1924, p. 356; Michie Code 1942, s. 3145o.)

"54-39. Violation a misdemeanor.—Any person violating any of the provisions of this chapter shall be deemed guilty of a misdemeanor. (1920, p. 499; 1924, p. 356; 1938, p. 496; Michie Code 1942, s. 3145l.)

"54-40. Investigation and report of violations.—All alleged violations of this chapter when reported to the Board and duly substantiated by affidavits, or other satisfactory evidence, shall be investigated by it. The Board may employ a special investigator to be paid by the State  
135 Treasurer from fees collected by the Board. If the evidence of violations is substantiated, the Board shall report the same to the attorneys for the Commonwealth of the cities or counties in which the violations are alleged to have occurred. (1938, p. 496; Michie Code 1942, s. 3145q.)

In United States District Court

JOHN B. MCGAUGHY, resumed.

Direct examination by Mr. NUSBAUM:

Q. Mr. McGaughy, will you explain to the Court the structure of your firm of Lublin, McGaughy and Associates in terms of the categories of the persons affiliated with it.

A. The firm operates as a partnership, four partners: two senior partners, two junior partners. In addition to that we have six associate members of the firm who—they are not

actually partners; they have practically all the rights of partners. They are all professional employees, registered architects or engineers. In addition to the associate members of the firm we have what we call key personnel. These are professionally trained men in their own particular field and head up one group or another in various phases of our activities. And beyond that, of course, we have the general book-keeper who in turn supervises the stenographic help in the office. We have one of the associate members of the firm who supervise in a general way all field parties that we have. And the chief of parties, of course, supervise the actual running of each field party and supervise the employees in the field party. In addition to that we have what we have termed

136 here—frankly, some of these terms we don't use in our own office because we have never felt that we had to give everyone a title. Never felt that was necessary in a private organization. However, it seems to become necessary in such matters as this. So we have qualified or classified some people, due to this trial, what we would term senior draftsmen. They do certain phases of the design work, they do certain drafting, and in certain cases they supervise to some extent the activities of the junior draftsmen. That is a very broad outline of the organization in a nutshell, so to speak.

Q. I want to next touch on this matter of plans and specifications, Mr. McGaughy. For the purposes of the record, the Government wants the record to be complete on that subject, will you state what plans and specifications are and what the purpose they serve and what they embody.

A. The plans and specifications basically represent the constructive, creative thinking behind creating an idea which can eventually through technological advancements of today be culminated by a building or structure. The plans themselves represent the thinking of the architects and the engineers who conceive the project. Specifications to a large extent amplify the plans in that they outline and specify the quality of the material to be incorporated into the project, as well as the quality of the workmanship. Also specifications give such pertinent data as strength of concrete to be used. In other words, basically I would say they outline the quality of the material. The plans tell how and where it is to be used, to differentiate. The two together comprise the thinking behind the project actually.

Q. Are any two projects you work on ever exactly alike?

A. Never happened yet.

137 Q. Can you explain why on your government contracts the Government requires that the plans and specifications become their property?

A. I have never actually asked that particular question of a government official but one is, of course, they like to keep the records; and they keep much more accurate records than most private concerns. They stipulate that in any contractual agreement they enter into. Another case obviously is the fact that a lot of the government work is restricted or confidential in nature and they remove all the plans and specifications after completed from the office. They very seldom even leave you a set of prints.

Q. Does the Government deal in the plans and specifications you furnish them? That is to say, are they offered for sale by the Government to others after you have performed your work and delivered to the Government?

A. No, sir; they are not.

Q. They are not traded in by the Government?

A. No.

Mr. NUSBAUM. I think to save time the Government will permit me to lead the witness in this respect.

Q. The work you do in your office is primarily designed to produce an original set of drawings and a stencil or reproducible form of the specifications, is that correct?

A. That is correct.

Q. Now, for private clients, as I understand your testimony, those original drawings and the original stencils remain in your office. They only go out for the purpose of being reproduced, is that correct?

A. That is right.

138 Q. Is any of the reproduction done in your office or by facilities which you own?

A. None of the reproduction work that we accomplish in our office goes outside of our own organization. What little we do in our office is done for our own convenience. All work that goes outside the office is sent to a commercial blueprinter and who in turn renders bills for that which is in turn charged to the client.



Q. Do you make any profit on the work done by the commercial blueprinter?

A. No.

Q. Your earlier testimony when you were called as a witness by the Government, you testified concerning a packing plant to be built for a party named Perlin. Is that plant going to be built according to the plans and specifications you prepared?

A. Not in accordance with those now in existence now, anyway. Whether it will be built by somebody else we don't know yet.

Q. You testified concerning some work personnel in your office accomplished on certain housing project and you indicated the contracts with the Housing Authority for the performance of that work were contracts with Mr. Lublin. When were those contracts entered into by Mr. Lublin?

A. I don't know the exact date they were entered into but they have been some years ago. These projects, most of them have already been completed. I think there is one right now that is under construction. Had been on the shelf for a number of years.

Q. Were you and Mr. Lublin partners at the time that contract was let to him?

A. No; we were not.

139 Q. It is only as a courtesy that the partnership employees are now doing these odds and ends of work which Mr. Lublin may have been obligated to under those old contracts?

A. That is correct.

Q. I just wanted to clear up the mystery why Mr. Lublin had separate contracts with the firm left over from olden days. That is a nonrecurring situation?

A. That is correct.

Q. On private work, Mr. McGaughy, where you design a structure for a private client, is it always put out on bid?

A. No. Frequently it doesn't go out to bid at all. Sometimes—say, frequently, the owner will want to select a particular contractor and just have him do the work on a cost-plus basis. Or the owner might want to negotiate a contract with a contractor he knows quite well and has a great deal of confidence in. Quite a bit of work is done in that manner.

Q. Is it possible to say on jobs which are put out for bid

what the average number of bidders is? Private jobs, of course, because you have no information about government jobs I assume.

A. That is a very difficult question to answer. Frankly—  
The COURT. Absolutely a worthless answer.

A. (Continued.) It runs anywhere from one bidder to no bidders. We have had actual jobs go out from no bids up to forty or fifty bidders.

Q. When you testify approximately 2 per cent of the bidders on private work are from out-of-State, in many instances—2 percent of 10, for example, would be less than one—there would be no out-of-State bidders. In certain jobs there would be 2, 3, 4, or 5 conceivably?

A. That is true. One of the reasons I think for that is that local work is not given a great deal of publicity beyond State boundaries, the exception being of course the Government apparently publicizes its activities a great deal more than private concerns do and probably accounts for the reason we have so many on government projects. I don't know that. I assume that is true.

Q. Mr. McGaughy, is there any distinction—before I ask you this question.

Mr. NUSBAUM. Does the Government concede that Mr. McGaughy is an expert witness on the subject of consulting engineering and architectural problems? Or shall I qualify him?

The COURT. He certainly holds himself out to be in the field. Whether he does in the courtroom is another matter.

Mr. RAY. Of course, he is an interested party but otherwise—in other words, if we were hunting an expert witness, we would likely certainly consider Mr. McGaughy as one in a matter in which he was not directly concerned. But I think that would only go to the weight of the evidence.

The COURT. That is all.

Mr. NUSBAUM. You admit his qualifications?

Mr. RAY. We admit he is an expert in the field in which he is engaged. Might add also I think he is an expert witness in other respects too.

141 By Mr. NUSBAUM:

Q. Is there a distinction to be made between the type of work that contractor's draftsmen do, that is, construction contractors, and the work performed by draftsmen in architectural and engineering firms?

A. Yes; there is quite a distinct difference. The architect and engineer's draftsman is engaged in creative thinking, setting that forth so that it can be recorded in a manner so to speak. The contractor's draftsman to a large extent, as far as I know anyway, is involved in helping the contractor accomplish his contract. In other words, he is involved in solving job problems as they occur, involved directly in the construction. A typical example might be where a contractor has to pour a reinforced concrete floor slab. The architect's structural engineer will design the floor slab, tell you how thick the concrete is, how the steel is to be placed in the side and so forth, but he doesn't care how you get the concrete there. All he wants is the end product. He is looking to see when you get through they have a concrete floor slab with that steel in place. Now, the contractor has to figure out how he is going to hold that concrete up there in its wet condition so it won't collapse and his draftsman designs certain forms for him to accomplish that purpose. In other words, the draftsman's job for the contractor is primarily concerned with how the contractor wants to proceed with the job. The architect-engineer's man is not concerned with how he does it. When it's through he wants to look at it and say, "Yes, it's all right." But how he accomplishes that is really of no concern to the architect-engineer.

Q. I want to ask you about your field men, Mr. McGaughy. It has been observed that certainly some of them work  
 142 more than forty hours a week. Is all their time spent in the field, so to speak?

A. Our field men, when they go any distance outside of the city—for instance, if they are working on a project that is 10 or 15 or 20 miles from our office, why we have customarily allowed them arbitrary amount of time for travel. That basically results in their getting almost portal to portal pay. They are picked up with our transportation at their home in the morning and delivered to their home in the afternoon. Whereas, they might work seven hour or eight hours in the field, they frequently in those conditions they are given credit for nine or ten hours, and that is a matter to try to compensate them in cases where it takes them an unusually long time to get to their work.



Q. Does that apply to your field crew which has been working in Yorktown?

A. That is correct. In that case I think we have allowed them three hours a day to get there and back.

Q. Whose responsibility is it, Mr. McGaughy, to accumulate the data that the field men collect and to bring that to the office?

A. As I said in a very broad outline, that comes under one of our associates, Mr. Hill. He in turn delegates certain amount of that authority to the various chiefs of parties that he has working for him.

Q. Your answer is that the party chiefs have the day to day routine responsibility for reporting into the office?

A. That is correct.

Q. The data accumulated in the field that day, is that correct?

A. Yes, sir.

143 Q. What responsibility, for example, does the man who holds the stick or carries the chain—chairmen I think they are called—what responsibility does he have in that regard?

A. He is strictly an employee, and he is doing what he is told to do by his chief of party. He has to have some knowledge of what he is doing. He has to be trained to some extent but it's like any—it's subprofessional employees.

Q. The question may not have been clear. What responsibility does that man have, the chairman, for getting the information into the office at the close of the day's activity?

A. He has none.

Q. What would be the purpose in him going back to the office at the end of the day?

A. The only purpose I know ever to come in is to collect their check, frankly. They have no reason to be in the office other than that.

Q. Concerning the work done by your Washington field crews, where are they engaged in work? Where is the project?

A. In Maryland.

Q. What is the name of that project?

A. That is what we termed the Washington Suburban Sanitation District Commission.

Q. Is there any other field work that they are engaged in?

A. I know of none right now.

Q. As a matter of fact, that is the primary reason you have field crews up there?

A. That is correct.

Q. To work on sanitation commission work?

144 A. Yes.

Q. And anything else they do or have done is just incidental, isn't that a fair statement?

A. That is correct.

Q. Will you explain what type of region this commission is engaged in, your field men are engaged in? The area in Maryland, what are the characteristics of it from standpoint of rural, urban, residential, industrial, commercial?

A. Basically it's an urban residential area that—it's really overflow from the District of Columbia. Most of those people are working in the District and of course the District has limited housing accommodations and, as you know, in Maryland as well as Virginia, the part near the District, there has been a terrific growth in population due to the Federal Government and those people seeking homes; that is all it is.

Q. These are sewer designs for new housing projects?

A. That is correct; water and sewer for housing projects.

The COURT. In and around Hyattsville?

The WITNESS. Yes, sir.

Mr. RAY. If your Honor please, it is also, as I understand, around Bethesda.

The WITNESS. It covers quite a wide area. Overall commission to cover that general area.

Mr. RAY. Because they charge the residents fees for their using those utilities that they put in there; that is, the Suburban Sanitary Commission. They don't actually construct the projects. You are talking about the sewer  
145 lines and that kind of stuff?

The WITNESS. That is right.

By Mr. NUSBAUM:

Q. Has your office been engaged in any jobs requiring supervision in the period covered by this complaint, Mr. McGaughy? That is to say, in the last two years?

A. Our office has not been engaged in what we term resident supervision of any of the projects that have been designed by us.

Q. You have not done any resident supervision?

A. That is correct.

Q. What is "resident supervision" as distinguished from some other kind of supervision?

A. Resident supervision means when you have a resident engineer assigned to the project who is there day in and day out and runs that particular project and looks after the owner's interest in that project. Usually he is the employee—might be an employee of the consulting engineering firm or he might be an employee of the municipality but he works in close coordination with the engineers when they do have one. But basically he is a trained man but he is there all the time. Generally speaking—and it's a very confusing term—but when the architects, engineers talk about supervision, they do not mean resident supervision. They mean from time to time they come by the job, depending upon the progress that is being made on a construction project, and check the work that has been accomplished to see that it meets the plans and specifications. If it does not meet them they call the attention

146 as the owner's representative to the contractor and request that he correct it to comply with the contract terms. If he does not do it, then of course it goes to arbitration.

Q. What category of personnel do your supervisory people, when you are under supervision, what category do they fall in?

A. They are all professional people. Usually the supervision is accomplished either by partner or associate. Sometimes it is done by a key personnel.

Q. When you say a "key personnel" for this person, what qualifications would that individual have?

A. Should be a registered architect or engineer.

The COURT. You ever send any secretarial help on a job like that?

The WITNESS. No, sir; never have.

By Mr. NUSBAUM:

Q. If you were to engage in resident supervision, would it be the same type personnel assigned or someone of less qualifications?

A. We would insist that it be a qualified professional individual with sufficient background to handle that project. You just can't turn an inexperienced person loose as your representative.



Q. Does your supervisor on the jobs you have supervised during this period have any responsibility for each piece of material that is delivered to the job?

A. No, sir.

Q. What control does he exercise over the contractor in terms of directing him to stop work, work faster, work differently, so forth?

A. Actually, we have no control over how the contractor proceeds with his work. The only prerogative we can exercise at all it to call the owner's attention to the fact  
147 that the project is not progressing satisfactorily if we think that is true, and if work hasn't been done properly. In other words, you could have what we consider faulty work on the project; we so advise the owner and tell the owner to withhold certain funds until the work has been accomplished.

Q. You make recommendations?

A. We make recommendations basically.

Q. Is there any military work on a job sheet or record in this case on which you furnished any supervision?

A. Not to my knowledge.

Q. In the overall picture the military work is roughly 70 to 75 per cent of the work of both offices averaged out?

A. It would be in that category at this time.

By the COURT:

Q. How about these jobs in France and Italy?

A. They are all government work.

Q. I know, but did you have any supervisory capacity there?

A. We have one project which we supervise. It's a sizable project. The employees on that particular project all receive salaries and remuneration at least two to two and a half times what is set up in these minimum standards by the Wage Hour law people. They are all exceedingly well paid people. They are all professionally qualified people. The only subprofessional people in any way connected with that project—actually not employees of ours—they are employees of a French service and they are French nationals.

Mr. NUSBAUM. If your Honor please, I believe the  
148 Government will agree that United States employees, even though they are United States citizens, employed abroad, and even though they are employed in the United States, employers are exempt from the coverage of the Act.

The COURT. I think that is true. The only thing, I was trying to get into the nature of the supervisory work.

By Mr. NUSBAUM:

Q. This job of which you speak, Mr. McGaughy, is a one-shot proposition, is it not?

A. That is right. And basically, I'd like to comment very briefly on the supervision aspect of this thing. Our people represent the United States Government. The work is being constructed by French contractors. It was designed by a French engineering concern, and the inspection is being done by French Corps of Engineers, and our particular position is basically to keep everyone honest, I think.

Q. At the conclusion of that particular job, will your partnership have any further undertakings or projects in Europe?

A. No; our partnership will not undertake any further work in Europe as such.

Q. Mr. McGaughy, I neglected to ask you one question. You made it perfectly clear that you are not doing what you call resident inspection or resident supervision. What are the characteristics in terms of frequency of visits to the job of the type of supervision that you do furnish on occasion?

A. That of course varies considerably, depending upon job progress and size of the undertaking. Obviously a man is building a small commercial structure, it doesn't take a  
149 great deal of effort to go by there and make a quick check to see what the progress is and how the workmanship is. If it's a more complicated structure you have to do it more often; again depending upon the progress of the contract. To try to give you a definite example, I would say probably you wouldn't average over once a week, one visit a week at the outside.

Q. That is the most it would be in the ordinary case?

A. That is right; yes.

Q. Barring some peculiar problem which required your presence on the site while it was being straightened out, how long does the inspector stay at the site on one of these trips? I call "inspector"—I mean the man you send out.

A. Usually the time on the site amounts to possibly an hour, an hour and a half.

Q. Once a week?

A. Yes.

Mr. TINCHER. We have no questions, your Honor.

I certify that the foregoing is a correct transcript of my notes.

EDNA B. ROMIG,  
Official Reporter.

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In United States District Court

*Appendix "B"*

PORTION OF STIPULATION

*Lublin-McGaughy & Associates, Washington, D. C.*

Name and address	Occupation	Basis of payment	Employment began	Qualification
Barbour, Mozelle S., 12904 Matey Road, Silver Spring, Md.	Stenographer.....	\$1.875 per hr.....	5/10/55	
Bendixen Warren E., 724 S. St. Asaph Street, Alexandria, Va.	Architect.....	\$2.50 per hr.....	1/11/56	Degree.
Brinley, Ronald, K., 6656 Hillandale Road, Chevy Chase, Md.	Draftsman.....	\$2.00 per hr.....	9/ 6/55	
Cahill, Thos. F., 3918 Decatur Avenue, Kensington, Md.	Draftsman.....	\$2.75 per hr.....	11/14/55	
Chambers, Victor D., 7309 Hilton Avenue, Takoma Park, Md.	Draftsman.....	\$2.00 per hr.....	2/10/56	
Downs, John F., Jr., 3H Crescent Road, Greenbelt, Md.	Draftsman.....	\$1.75 per hr.....	4/19/56	Degree.
151 Foerster, Herbert G., 2123 Eye Street NW., Washington, D. C.	Draftsman.....	\$2.125 per hr.....	10/13/52	
Gaddess, Barrymore T., 3413 Tulane Drive, Hyattsville, Md.	Rodman.....	\$1.35 per hr.....	4/30/56	
Heineman, Wm. F., 3101 Queens Chapel Road, Mt. Rainer, Md.	Ch. architect.....	\$650 per mo.....	12/ 5/55	Degree.
Hobbs, Richard A., 63 Richtchie Avenue, Silver Spring, Md.—637 Richtchie Avenue.	Civil engineer.....	\$433.33 per mo.....	2/ 6/56	Degree.
Hoover, Anne M., 2446 Ordway NW., Washington, D. C.	Stenographer.....	\$1.875 per hr.....	10/31/55	
MacLane, J. Allan, 4700 31st Street Place, Mt. Rainer, Md.	(Associate).....	\$650.00 per mo.....	10/31/53	
Mizell, Billy F., 1223 Grove Street, Paris, Tenn.	Party chief.....	\$346.66 per mo.....	3/ 7/56	No degree—supervises 3 employees.
Patterson, Gerald R., 1137 Wayne Road, Falls Church, Va.	Architect.....	\$2.50 per hr.....	10/31/55	Degree.
152 Balston, John J., 1604 Q Street NW., Washington, D. C.	Civil engineer.....	\$433.33 per mo.....	4/ 9/56	Degree—supervises 2 or 3 employees.
Ritter, Wm. H., Jr., 3021 M Street SE., Washington, D. C.	Draftsman.....	\$1.50 per hr.....	2/27/56	
Roberts, Donald L., 446 Ottaway Street, Forest Heights, Md.	Draftsman.....	\$2.25 per hr.....	5/ 4/53	



**Lublin-McGaughy & Associates, Washington, D. C.—Continued**

Name and address	Occupation	Basis of payment	Employment began	Qualification
Schaeffer, Glenn B., 4014 Glenridge Street, Kensington, Md.	(Associate).....	\$833.33 per mo....	5/ 4/55	
Smith, Robert B., 522 Bellevue Drive, Washington, D. C.	Draftsman.....	\$1.35 per hr.....	4/ 2/56	
Sullivan, Ed. F., 203 East Gilpin Avenue, Norfolk, Va.	Engineer.....	\$520.00 per mo....	9/16/55	Degree.
Tate, Victor B., II, 226 Penguin Place, Bird Neck Point, Virginia Beach, Va.	Transitman.....	\$1.30 per hr.....	2/27/56	
Wagner, Howard L., 2803 North Van Dorn, Alexandria, Va.	Architect.....	\$520.00 per mo....	11/15/55	Degree.

**153 In the United States Court of Appeals for the Fourth Circuit**

**No. 7488**

**JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, APPELLANT**

*versus*

**LUBLIN, MCGAUGHY AND ASSOCIATES, A COPARTNERSHIP, AND ALFRED M. LUBLIN, JOHN B. MCGAUGHY, WILLIAM T. McMILLAN AND WILLIAM MARSHALL, JR., INDIVIDUALLY AND DOING BUSINESS AS LUBLIN, MCGAUGHY AND ASSOCIATES, APPELLEES**

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT NORFOLK**

***Docket entries***

July 15, 1957, record on appeal filed and appeal docketed.

July 15, 1957, original exhibits certified up.

July 17, 1957, appearance of Alan J. Hofheimer and Robert C. Nusbaum entered for the appellees.

July 20, 1957, appearance of Bessie Margolin, Assistant Solicitor, United States Department of Labor, entered for the appellant.

July 25, 1957, appearance of John M. Hollis, Assistant United States Attorney, entered for the appellant.

September 9, 1957, brief for appellant filed.

September 9, 1957, appendix to brief for appellant filed.

September 26, 1957, brief and appendix for appellees filed.

October 17, 1957, reply brief for appellant filed.

154 Minute entry of argument and submission—October 23, 1957 (omitted in printing).

155 In United States Court of Appeals for the Fourth Circuit

No. 7488

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES  
DEPARTMENT OF LABOR, APPELLANT

*versus*

LUBLIN, MCGAUGHY AND ASSOCIATES, A COPARTNERSHIP, AND  
ALFRED M. LUBLIN, JOHN B. MCGAUGHY, WILLIAM T.  
MCMILLAN AND WILLIAM MARSHALL, JR., INDIVIDUALLY  
AND DOING BUSINESS AS LUBLIN, MCGAUGHY AND ASSO-  
CIATES, APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF VIRGINIA, AT NORFOLK

(Argued October 23, 1957. Decided November 25, 1957).

Before PARKER, Chief Judge, and SOPER and HAYNSWORTH,  
Circuit Judges.

Bessie Margolin, Assistant Solicitor, United States Depart-  
ment of Labor, (Stuart Rothman, Solicitor; Eugene R. Jack-  
son, Attorney; and Jeter S. Ray, Regional Attorney,  
156 United States Department of Labor, on brief) for Ap-  
pellant, and Robert C. Nusbaum and Alan J. Hofheimer  
for Appellees.

*Opinion*

Decided November 25, 1957

SOPER, Circuit Judge:

The Secretary of Labor brings this suit under the Fair Labor Standards Act, as amended,\* against Lublin, McGaughy and Associates, a copartnership, and against the individual mem-

\*Act of June 25, 1938, ch. 676, as amended by the Fair Labor Standards amendments of 1949, ch. 736; 29 U. S. C. § 201 et seq.

bers of the firm who are architects and engineers with a main office in Norfolk, Virginia, and a branch office in Washington, D. C. The complaint charges that the defendants have violated various sections of the statute, in that they have employed many persons in interstate commerce and in the production of goods for interstate commerce for workweeks longer than forty hours without compensating them for the excess hours of employment at rates not less than one and one-half ( $1\frac{1}{2}$ ) times the regular rates at which they were employed, in violation of §§ 7 and 15 (a) (2) of the statute; and in that they have failed to keep adequate records of their employees' wages and hours and other conditions—as prescribed by the Federal Regulations—in violation of §§ 11 (c) and 15 (a) (5) of the Act; and in that they have transported goods in interstate commerce, in the production of which many of their employees had been employed, in violation of § 7 of the Act. An injunction was prayed restraining the defendants from further violation of the statute. The District Judge, after hearing, denied the relief prayed, resting his  
 157 decision in large part on the conclusion that the plans and specifications prepared by the firm were not “goods” within the meaning of the Fair Labor Standards Act.

The principal questions to be considered grow out of the contentions of the Government: (1) that the drawings, plans and specifications prepared by the employees of the firm are “goods” and that the preparation thereof is “production of goods for commerce” within the meaning of § 3 of the statute; and (2) that the employees of the firm who participated in interstate travel and communications required for the conduct and coordination of the firm's offices in Norfolk and Washington were “engaged in commerce” within the meaning of § 7 (a) of the statute; and (3) that a large part of the work of the firm's draftsmen, fieldmen and clerical employees is so closely related to projects for the improvement, expansion or replacement of interstate instrumentalities as to bring them within the “in-commerce” coverage of the Act. The Government recognizes that employees engaged in a professional capacity are exempted by § 13 of the statute, but seeks to bring the nonprofessional employees of the firm within the coverage of the Act.

The defendants, who reside in Norfolk, are architectural and consulting engineers. They have worked and are now



employed on numerous projects in Virginia, Maryland and the District of Columbia, and have worked on some projects in North Carolina and overseas. They include, primarily, projects for the improvement, enlargement and repair of installations at military bases, airfields, shipyards and radio stations for the United States military services, and also a substantial number of state and municipal undertakings and projects. These activities require constant coordina-

158 tion and communication, as well as transmission of information and materials between the two offices. In general, the defendants collect the necessary data for the projects, confer with their clients in regard thereto, and prepare the drawings, estimates and surveys which are used in connection with the projects. They also supervise and inspect the construction from an architectural and engineering standpoint by furnishing surveying and engineering services to contractors while construction is in progress.

To perform this work the defendants have about thirty employees in the Norfolk office and twenty employees in the Washington office, including architects, engineers, draftsmen, fieldmen, office managers, stenographers and bookkeepers. This action is concerned only with the nonprofessional employees consisting of draftsmen, fieldmen, clerks and stenographers.

In the course of the business necessary surveys and topographical maps are made and then the draftsmen, working under the supervision of the engineers and architects, prepare the drawings and designs from which blueprints are reproduced. The drawings, together with explanatory specifications, contain the information necessary for estimating the cost, financing the project, the bidding of contractors, and guidance to the contractor in constructing the project. The military, governmental and commercial structures on which the defendants are now and in recent years have been engaged are intricate in design and construction and could not be constructed without the plans and specifications prepared by the employees, many of which are transmitted across state lines. They consist of physical material of negligible value in itself, though, as copies of the master drawings, they contain  
159 information which may be of substantial value to the particular client in the construction of the project and in planning subsequent alteration and repair. It is estimated

that on the average, one-half of the charges of the defendants for their architectural and engineering services is for work upon the master drawings and specifications and in the development of information embodied in them.

The plans, specifications and estimates prepared for government agencies, which comprised the greater part of the defendants' work, are submitted to these agencies and become their property. Frequently numerous copies of the specifications and drawings are required. The advertisement of a proposed government project results in requests for sets of plans and specifications from out-of-state contracting firms and these are sent by the Government to the prospective bidders to enable them to prepare and submit bids. When required by the terms of the contract the defendants furnish copies of the specifications and drawings which are reproduced by an outside blueprint company. For commercial clients copies of the drawings and specifications are furnished while the originals are retained by the defendants in case additional copies are needed. These copies are also obtained from commercial blueprint establishments at an additional cost to the clients.

The fieldmen include surveyors, transit men and chain men who work under the supervision of a professional engineer. They survey boundaries, take borings, etc. at the work site, frequently traveling from the District of Columbia to the site in Maryland and returning to the defendants' office in Washington in connection with their duties. They have little or no

160 duty in the office but gather the material and bring it to the office as a basis for the preparation of the drawings and specifications. Some of the field work was done on projects for the Washington Suburban Sanitation Commission located in Maryland to which a large part of the time of the firm's Washington office has been devoted for the period of a year. A survey party reports to the Washington office each morning, drives to Maryland with the necessary field books and field equipment, makes surveys and gathers data, which is brought back to the Washington office at the end of each day and turned over to the draftsmen. For approximately 50 percent of their commercial clients, for whom a minor part of defendants' work is performed, the defendants supply employees who supervise the construction of the project so as to determine whether the construction is proceeding in



accordance with the plans and specifications. An additional charge is made for this type of work.

Projects for the improvement or repair of interstate instrumentalities on which the defendants have worked include airfields and airplane facilities for which streets are widened or constructed, hangers are repaired or altered, and extensions are built. Radio and television facilities are relocated, repairs to government buildings at shipyards and machine shops are made, and other work in Maryland, Virginia and North Carolina is constructed.

Stenographers type letters, specifications and other documents, some of which are mailed to points out of the state. Some of the employees handle telephone calls, and some of those calls are from and to localities out-of-state. Payroll data for employees in the Washington office is mailed bi-monthly to Norfolk where payroll checks are prepared and returned to Washington through the mail. Employees of the bookkeeping department who prepare vouchers for  
161 the payment of bills of the defendant, prepare those for out-of-state as well as local creditors.

We consider first the contention of the Government which goes to the heart of the case, that the plans, drawings, specifications and blueprints prepared by the non-professional employees of the defendants are "goods" within the meaning of § 3 (1) of the Act where the term is defined as "goods, wares, products, commodities, merchandise, or articles or subjects of commerce of any character." The District Judge held to the contrary, following the decision in *McComb v. Turpin*, D. C., Md., 81 F. Supp. 86, where, as in the pending case, an injunction was sought to prevent violation of the statute by architects and consulting engineers. One of the contentions of the Government was that the mere preparation of plans intended to be sent by mail, express or messenger to a client in another state constitutes production of goods for commerce. On this point, Judge Chesnut said (pp. 88 and 89):

" \* \* \* This can be true only if the definition of the word 'goods' as contained in the Act is construed to cover the preparation of the plans, drawings and specifications referred to in the stipulation. The definition [§ 203 (1)] defines 'goods' to mean 'goods \* \* \* wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof'. I do not think even this broad



literal definition could fairly be construed to apply to the plans, drawings and specifications prepared by or under the supervision of the defendants or their employees. They are only a physical embodiment in words of professional conclusions."

162 "Certainly the word 'goods' could not be construed to include professional advices and its definition should not be construed to include the typewritten or mechanical expression by which the advice is given. These plans, drawings and specifications are not themselves the subject of barter or sale, but only the written embodiment of professional advice, and incidental thereto. They are specifically prepared to meet the particular problem of a specific client and are not sold or offered for sale to the public generally. They are, of course, quite unlike stocks, bonds and commercial paper which are themselves instrumentalities of commerce. *Bozant v. Bank of New York*, 2 Cir., 156 F. 2d 787. This distinction was well made by Circuit Judge Learned Hand in the case just cited, 156 F. 2d at page 789 as follows:

"Some of the activities which went on, we agree, should on no theory be counted. A lawyer who in the course of his practice writes letters, or draws deeds or wills, or prepares briefs and records, is not on that account within § 203 (j); and the same is true of the correspondence of a broker and of a banker. The definition of "goods" in § 203 (i) might literally go so far even as that; but it would be unreasonable to the last degree to suppose that Congress meant to cover such incidents of a business whose purpose did not comprise the production of "goods" at all."

The Department of Labor cited this decision in its Interpretative Bulletin, Part 776, Subpart A, General (May, 1950), Title 29, Chapter V, Code of Fed. Reg. (776.19 (b) (2), where it said:

163 "On the other hand, the legislative history makes it clear that employees of a 'local architectural firm' are not brought within the coverage of the Act by reason of the fact that their activities 'include the preparation of plans for the alteration of buildings within the state which are used to produce goods for interstate commerce'. Such activities are not 'directly essential' enough to the production of goods in the buildings to establish the required close rela-

tionship between their performance and such production when they are performed by employees of such a 'local' firm."

We are now told, however, that this pronouncement is no longer tenable because of the decisions of the Supreme Court in *Western Union Telegraph Co. v. Lenroot*, 323 U. S. 490 (January 8, 1945), and *Powell v. U. S. Cartridge Co.*, 339 U. S. 497 (May 8, 1950). In the *Western Union* case the Supreme Court held that telegraph messages are "goods" within the meaning of § 203 (i) because they are "subjects of commerce", one of the terms in the inclusive list enumerated in the section. In the course of the opinion, the Supreme Court noted that in *Western Union Telegraph Co. v. Pendleton*, 122 U. S. 347, in declaring invalid a statute which attempted to regulate the activities of telegraph companies, it had held that intercourse between the states by telegraph messages amounts to interstate commerce in the transportation of "ideas, wishes, order, and intelligence". This holding, it is now said, demonstrates that the embodiment of ideas contained in plans and specifications are also "goods" within the meaning of the Act.

The *Powell* case held that munitions manufactured by a private contractor at a government plant were "goods", and that his employees were engaged "in the production of goods for commerce". Munitions were held to be "goods",  
164 because they were "products" within the meaning of § 203 (i) of the statute; and the employees were held to be engaged in the production of "goods" for commerce, although the munitions were not to be sold but used in the war, because of their "transportation" to destinations outside the state.

We do not think that these decisions require us to abandon the conclusion reached by Judge Chesnut and by Judge Hoffman in the pending case. The Department of Labor itself did not give this effect to the *Western Union* decision of 1945, notwithstanding the holding therein that the transportation of ideas embodied in tangible form may amount to commerce between the states. On the contrary, it issued its Bulletin in 1950 following the lines laid down by Judge Chesnut. The practical distinction between the business of interstate communication by telegraph and the activity of making plans and drawings which are used merely as guides for building construction, is so obvious as not to deserve further discus-

sion. Nor does the Powell case support the Government's position. It does show that the term "goods" in § 203 (i) of the statute is not limited to those bought and sold, but its holding that munitions of war are "goods" in no way tends to show that such articles as plans and specifications, which possess markedly different characteristics, are also "goods" in the statutory sense.

The defendants in this case were independent engineers and architects engaged in essentially local activity in each of the offices which they maintained. They were not employed to manufacture documents to be sold or transported in interstate commerce but to give professional advice and assistance which of necessity was given permanent form as plans  
165 or specifications so as to be available for guidance and reference. Clearly such plans were not "goods" in the ordinary case, although it is possible to conceive a situation in which standard plans or blueprints for building construction might be prepared for transportation or sale in such a way as to fall within the coverage of the Act. That, however, did not happen here. The copies of the plans that were made and sent out for the convenience of the clients and their bidders were not transported as subjects of commerce but in order to show the interested parties the sort of construction that was required; and the mere fact that the documents crossed state lines did not alter their inherent nature.

The second contention of the Government is based on the interstate travel and communication of the employees of the firm between its two offices and between these offices and the locations of its out-of-state clients and their contractors. It is said that these activities constitute engagement "in commerce" even though the plans and specifications are not "goods" produced in commerce within the meaning of the Act; and many cases are cited in which the Courts have found that the transportation of documents and records as well as the travel of employees from state to state are forms of interstate commerce which subject the participants to regulation by Congress. Thus the Courts have pointed out that the use of the mails and other facilities of interstate commerce perform an important, if not a vital function in the operation of businesses which extend beyond state boundaries,



e. g., a holding company in control of corporations operating in seventeen states, *North American Co. v. S. E. C.*, 327 U. S. 686, 694, 695; the production and presentment of theatrical attractions on a multistate basis, *United States v. Schubert*, 348 U. S. 222; the business transactions across state lines of a fire insurance company, *United States v. Underwriters Assn.*, 322 U. S. 533; the business of conducting schools by means of correspondence through the mails from state to state, *International Text Book Co. v. Pigg*, 217 U. S. 91; *Federal Trade Commission v. Civil Service T. Bureau*, 6 Cir., 79 F. 2d 113; and the business of communications itself by use of the telegraph, *Western Union Telegraph Co. v. Lenroot*, 323 U. S. 490, and by newspaper, *Associated Press v. N. L. R. B.*, 301 U. S. 103. Similar rulings involving the Fair Labor Standards Act have also been made where interstate communication was not the principal or direct aim and necessity of the enterprise but, nevertheless, performed an important function. Thus in *Donovan v. Shell Oil Co.*, 4 Cir., 168 F. 2d 229, it was held that a clerk who prepared payroll checks mailed to employees in different states and kept personnel and statistical records in the office of an oil company concerned with the interstate transportation of petroleum products was engaged in commerce; and in *Durkin v. Joyce Agency*, D. C., N. D., Ill., 110 F. Supp. 918, 923; 348 U. S. 945, that clerks and switchboard operators employed by a warehouse corporation concerned with interstate transportation who used the telephone and mails in carrying on the business were engaged in interstate commerce, and in *Aetna Finance Co. v. Mitchell*, 1 Cir., 247 F. 2d 190, that employees of a loan company whose operation involved a constant flow of documents, information, etc. through the mails were engaged in interstate commerce. The transportation of persons from state to state in the course of business operations may also constitute interstate commerce, *Edwards v. California*, 214 U. S. 160; *Caminetti v. United States*, 242 U. S. 470; *Hemans v. United States*, 6 Cir., 163 F. 2d 228, 239; *Cleveland v. United States*, 329 C. S. 14.

167 It is manifest however, notwithstanding this well established line of authority, that the mere use of the mails and of transportation facilities across state lines is not necessarily interstate commerce. There must be some relation to a business which is interstate in character. This

is found most clearly where the very essence of the business is interstate commerce itself, as in the sending of telegraph messages, and it also exists where the employer's business is interstate in character, as illustrated above, in the course of which interstate communication is a material part. But where the business is essentially local and there is no production of "goods," communication which is merely incidental to the local enterprise cannot be classed as commerce. The inter-office communication in this case related to the local production of plans and specifications, and the fieldmen who travelled from state to state were sent out to get the information as to the character of the work to be done, so that the architects and engineers might do their preparatory work. All of these activities related to the production of plans, partook of their intrastate character, and cannot be fairly characterized as commerce between states.

Finally, the Government contends that it should prevail because the work of certain draftsmen, fieldmen and clerical employees relates to projects for the improvement, enlargement and repair of instrumentalities of interstate commerce, for the most part military installations, airfields, shipyards and radio facilities for the United States, as well as municipal governmental projects such as turnpikes and road improvements, and projects for private enterprise such as was done in the remodeling of Trailway Bus terminals in Washington and in Baltimore. Undoubtedly the term "in commerce" covers not only the activity of workers who share directly in the work of construction but also those who do the paper work such as  
 168 the preparation of lists of material or payrolls, or who serve as fieldmen and timekeepers on the job. In some cases there is reference to the preparation of plans or drawings for construction work by employees of the contractor as evidence that work "in commerce" is being performed. See *Laudadio v. White Const. Co.*, 2 Cir., 163 F. 2d 383, 386; *Ritch et al. v. Puget Sound Bridge & Dredging Co., Inc.*, 9 Cir., 156 F. 2d 334, 337; *Archer v. Brown*, 5 Cir., 241 F. 2d 663, 668; *Chambers Const. Co. v. Mitchell*, 8 Cir. 233 F. 2d 717, 723; *Mitchell v. Vollmer & Co.*, 348 U. S. 427. There is, however, no clean-cut holding that the work of employees of independent architects, such as are before us in this case, is "commerce" under the Act.



It may be that the activities of the employees in question constitute an indispensable link in the chain of causation whereby instrumentalities of commerce are extended or improved; but it does not follow that their work is so closely connected with interstate commerce as to be a part of it. In determining the question, the character of the work of the employees rather than the occupation of the employer is the controlling factor, but the occupation of the employer must nevertheless be taken into consideration, for the Act does not attempt to regulate local activity. This is most clearly shown by contrasting the decision of the Supreme Court in *Borden Co. v. Borella*, 325 U. S. 679, with its decision in *10 E. 40th St. Co. v. Callus*, 325 U. S. 578, which were decided on the same day. In the first case it was held that the maintenance employees of a building owned and chiefly used for central offices by an interstate producer were within the regulated area as persons engaged in an occupation necessary to the production of goods for commerce; but in the second case it was held that

169 employees doing the same kind of work in a metropolitan office building operated as an independent enterprise and used by every variety of tenants, including producers of goods for commerce, did not have such a close and immediate tie with the processes of production as to be covered by the Act. The Court said, 325 U. S. 583:

“\* \* \* Mere separation of an occupation from the physical process of production does not preclude application of the Fair Labor Standards Act. But remoteness of a particular occupation from the physical process is a relevant factor in drawing the line. Running an office building as an entirely independent enterprise is too many steps removed from the physical process of the production of goods. Such remoteness is insulated from the Fair Labor Standards Act by those considerations pertinent to the federal system which led Congress not to sweep predominantly local situations within the confines of the Act. To assign the maintenance men of such an office building to the productive process because some proportion of the offices in the building may, for the time being, be offices of manufacturing enterprises is to indulge in an analysis too attenuated for appropriate regard to the regulatory power of the States which Congress saw fit to reserve to them. Dialectic inconsistencies do not weaken the validity of practical adjustments, as between the State and federal authority, when



Congress has cast the duty of making them upon the courts. Our problem is not an exercise in scholastic logic."

The partners in the pending case may be likened to the owners of the general office building in the Callus case. They did work for a general miscellany of clients in connection with construction projects, some of which were local in nature while others were such that the construction workers themselves were within the coverage of the Act. But the architectural work itself was local and of necessity gave color to the activities of their subordinates and took them outside the scope of the statute. It is this element which the Government and the decision in *Mitchell v. Brown*, 8 Cir., 254 F. 2d 359, upon which the Government relies, seem to ignore. For these reasons we do not think that the employees of the defendants were subject to the provisions of the statute. This is not to say that some employees of the firm may not have participated so actively at the site of construction as to be covered; and nothing in this decision is intended to preclude further proceedings as to them. There is however no sufficient showing of the nature of their activities in the record in this case as to justify the issuance of an injunction.

Affirmed.

171 In United States Court of Appeals for the Fourth  
Circuit

No. 7488

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES  
DEPARTMENT OF LABOR, APPELLANT

vs.

LUBLIN, MCGAUGHY AND ASSOCIATES, A COPARTNERSHIP, AND  
ALFRED M. LUBLIN, JOHN B. MCGAUGHY, WILLIAM T.  
MCMILLAN AND WILLIAM MARSHALL, JR., INDIVIDUALLY  
AND DOING BUSINESS AS LUBLIN, MCGAUGHY AND ASSO-  
CIATES, APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF VIRGINIA

*Judgment*

November 25, 1957

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

November 25, 1957.

MORRIS A. SOPER,  
*United States Circuit Judge.*

December 30, 1957, mandate issued and transmitted to the Clerk of the United States District Court at Norfolk, Virginia.

December 30, 1957, record on appeal, transcript of testimony, and exhibits returned to the Clerk of the United States District Court at Norfolk, Virginia.

February 6, 1958, record on appeal, transcript of testimony, and exhibits received from the Clerk of the United States District Court at Norfolk, Virginia.

172 [Clerk's certificate to foregoing transcript omitted in  
printing.]

173

In Supreme Court of the United States

No. 802, October Term, 1957

[Title omitted.]

*Order allowing certiorari*

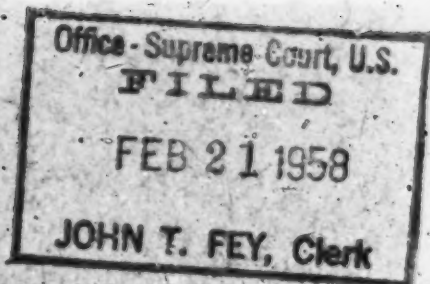
March 31, 1958

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.



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SUPREME COURT, U. S.



No. ~~882~~ 37

**In the Supreme Court of the United States**

OCTOBER TERM, 1958

**JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED  
STATES DEPARTMENT OF LABOR, PETITIONER**

v.

**LUBLIN, McGAUGHY & ASSOCIATES, ET AL.**

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE FOURTH CIRCUIT**

**J. LEE RANKIN,**

*Solicitor General,*

*Department of Justice, Washington 25, D. C.*

**STUART ROTHMAN,**

*Solicitor,*

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*Assistant Solicitor,*

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*Department of Labor, Washington 25, D. C.*

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## In the Supreme Court of the United States

OCTOBER TERM, 1957

No. —

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

LUBLIN, MCGAUGHY & ASSOCIATES, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of the Secretary of Labor, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above case on November 25, 1957.

## OPINIONS BELOW

The opinion of the District Court (R. 1a-9a)<sup>1</sup> is not officially reported (13 WH Cases 211). The opinion of the Court of Appeals (App. A, *infra*, pp. 29-44) is reported at 250 F. 2d 253.

\* <sup>1</sup> Record references are to petitioner's appendix as printed for the use of the Court of Appeals, nine copies of which have been filed with the Court.



**JURISDICTION**

The judgment of the Court of Appeals was entered on November 25, 1957 (App. A, *infra*, p. 44). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

**QUESTION PRESENTED**

Respondents are partners in a consultant architectural-engineering business—with offices in Norfolk, Virginia and in Washington, D. C., and foreign associates overseas—engaged in preparing plans and specifications essentially for industrial, as distinguished from residential, projects. A substantial proportion of their work is for out-of-state clientele or projects, and the great bulk of it consists of the preparation of plans and specifications for federal, state and municipal governmental projects, many of which are for the improvement, repair, or enlargement of interstate instrumentalities or facilities.

The question presented is: Whether respondents' non-professional employees (draftsmen, fieldmen, and clerical workers)—who work on the plans and specifications for projects for improvement of interstate instrumentalities or facilities, and whose regular duties also include the preparation of drawings, plans, specifications, etc., transmitted across state lines, or direct and substantial interstate communication by telephone and correspondence, or travel across state lines—are engaged "in commerce or in the production of goods for commerce" within the meaning of the Fair Labor Standards Act.

## STATUTES INVOLVED

Pertinent provisions of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended, c. 736, 63 Stat. 910 (29 U. S. C. 201, *et seq.*), are set forth in full in petitioner's appendix as printed for the Court of Appeals (R. 116a-119a). The provisions particularly involved here are Sections 3 (b), (i), and (j), as follows:

SEC. 3. [52 Stat. 1061; 63 Stat. 911]. As used in this Act—

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such

goods, or in any closely related process or occupation directly essential to the production thereof, in any State.

#### STATEMENT

This action was brought by the Secretary of Labor under Section 17 of the Fair Labor Standards Act to enjoin respondents from violating the overtime and record-keeping requirements of the Act with respect to their non-professional employees—draftsmen, fieldmen and stenographer-bookkeepers.\*

1. Respondents are partners engaged in a consultant architectural-engineering business, with a principal office in Norfolk, Virginia, and a branch office in Washington, D. C., and with foreign associates in France and Italy.

Respondents' business relates essentially to industrial, as distinguished from residential, projects, and admittedly a substantial amount of their work is for out-of-state projects and out-of-state clientele, at

\* It is stipulated that, if the Act covers these employees, overtime and record-keeping violations exist (Stip. R. 11a; R. 94a-97a). This action is not concerned with "professional" employees who may meet the requirements for exemption under Section 13 (a) (1) of the Act, which provides:

"(a) The provisions of sections 6 and 7 shall not apply with respect to (1) any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the Administrator); \* \* \*"

The exemption issue was not raised by respondents in the courts below and is not presented here, the only issue being whether employees who do not qualify as exempt "professional" employees as defined and delimited by the Secretary of Labor are within the general coverage of the Act. See 29 C. F. R. (1957 Supp.) Pt. 541.3; 14 F. R. 7705.



least 50% of the work of the Washington office relating to out-of-state projects (R. 13a). As summarized in the opinion below, "[t]hey have worked and are now employed on numerous projects in Virginia, Maryland and the District of Columbia, and have worked on some projects in North Carolina and overseas" (App. A, *infra*, p. 31). "These activities require constant co-ordination and communication, as well as transmission of information and materials between the two offices" (*ibid.*). The plans and specifications are "frequently transmitted out of state" (R. 6a), both between respondents' offices for correlation, integration or review (R. 68a, 72a), and, as indicated in more detail, *infra*, pp. 8-10, to out-of-state clients with copies for out-of-state bidders, contractors and suppliers of materials.

Respondents employ a total of 65 to 70 employees (including professional and non-professional), of whom about 30 are in the Norfolk office, about 20 in the Washington office, and about 15 to 20 overseas (R. 12a, 85a). With "a direct private telephone line between the Norfolk and Washington offices," "telephonic communications are numerous and the line is used for the purpose of controlling, supervising and coordinating the work of the Washington office from Norfolk" (R. 5a). Also, "payrolls for both offices, as well as for employees in foreign offices are made up in the Norfolk office and checks are mailed to Washington and foreign countries" (*ibid.*). No set rule is maintained with respect to where a set of plans is prepared—"if we want to do part in Washington we do it; if we want to do part in Norfolk, we do it" (R. 68a). As both the trial court and the Court of

Appeals found, respondents' non-professional draftsmen, fieldmen and clerical employees engage substantially in the extensive interstate communications or interstate travel incident to respondents' business and in the preparation of plans, drawings, specifications, etc., "many of which are transmitted across state lines," and many of which are prepared for interstate projects (App. A, *infra*, pp. 32-34; R. 5a-6a).

2. The great bulk of respondents' business consists of the preparation of plans, specifications and drawings for federal, state and municipal governmental projects. As stated in the opinion below, they "include, primarily, projects for the improvement, enlargement and repair of installations at military bases, airfields, shipyards and radio stations for the United States military services, and also a substantial number of state and municipal undertakings and projects." (App. A, *infra*, p. 31.) About 60 percent of the work of the Virginia office is done pursuant to contracts with United States Army and Navy agencies, and about 85 percent of the work of the Washington office is for the Army and Navy or for state and municipal government agencies (R. 2a). For details of the numerous projects for improvement, repair, or enlargement of interstate instrumentalities or facilities, on which respondents worked for the two year period ending April 1956, see Appendix B, *infra*, pp. 45-47.

3. The plans and specifications furnished by respondents for such projects contain detailed drawings, blueprints, surveys, estimates and other data, together with specific detailed instructions to the builder on

every aspect of the actual construction work. The industrial-type projects, and particularly the government projects, on which respondents have been primarily engaged "could not be constructed without the plans and specifications prepared by the [respondents'] employees" (App. A, *infra*, p. 32; R. 48a-49a). These plans and specifications obviously include much more than a professional architect's designs and advice. As is illustrated by the voluminous sets of plans and specifications prepared by respondents for projects listed in Appendix A to the stipulation (R. 18a-29a),<sup>\*</sup> most of the work is evidently more engineering than architectural in nature, and it involves the assembling and compilation of detailed estimates, measurements, field survey information, materials and equipment specifications, carpentry, electrical and other construction data, and similar routine work of a non-professional nature.

The plans and specifications include in minute detail all of the data, information, and instructions needed to guide the clients and their contractors, subcontractors and material suppliers, in bidding, financing, purchasing materials and equipment, as well as in carrying out the actual construction work (R. 100a). The specifications include not only the general conditions, which are to govern the construc-

---

<sup>\*</sup> Representative samples of such plans and specifications were attached to the stipulation as Appendix C (R. 12a, 33a) and an illustrative set of specifications was introduced as Plaintiff's Exh. 4 (R. 44a-45a). Because of their bulk, they were transmitted to the Court of Appeals in original form and were not printed in the record.



tion work, but also specific data in regard to the kinds, types, sizes of materials to be used, and where and how they enter into the construction. For example, on projects requiring substantial brick work or concrete, the composition and precise proportions of the mixture of brick mortar and concrete, as well as the method of mixing, are specified in detail. It is common knowledge that plans and specifications for government construction projects, in particular, require such detailed data and instructions.

4. The plans and specifications prepared for various federal, state, and municipal government agencies (which have been the source of the bulk of respondents' business, Stip. R. 13a) are submitted to these agencies in their original form and become the property of the agencies (Stip. R. 14a). Since such government agencies frequently require numerous copies of the specifications, respondents prepare and furnish "original, reproducible drawings and tracings (plans), and stencils for making multiple copies" (Stip. R. 13a). As stated in the findings of the trial court, the "government contracts admittedly require a great number of specifications which are reproduced by an independent blueprint company and are subsequently sent by the government agencies to prospective bidders, many of whom are without the State of Virginia and the District of Columbia" (R. 2a-3a).

A large portion of the governmental work (the full 60 percent at the Norfolk office) is done for the United States Army and Navy (*ibid.*). The plans, drawings, specifications, estimates, and advance-planning reports prepared by respondents' employees for

these projects are furnished primarily to the Corps of Engineers, the Fifth Naval District, and the Potomac River Naval Command (R. 112a, 113a, 68a). Copies of all preliminary plans, specifications, and analyses of design furnished to the Norfolk District Corps of Engineers are transmitted to the Division Engineer, North Atlantic Division, New York, for review and approval; for large projects, marked-up drafts of final specifications are also transmitted to New York for review and approval; and in all cases, a set of the completed final plans and specifications as furnished to prospective bidders are transmitted to the North Atlantic Division in New York for record purposes (Govt's. Exh. No. 2, R. 113a-114a). Similarly, all advance-planning reports and copies of all plans and specifications furnished by respondents to the Fifth Naval District at Norfolk are forwarded to the Bureau of Yards and Docks, Washington, D. C., for review and approval (Govt's. Exh. No. 1, R. 112a-113a).

Copies of the final plans and specifications are also sent to any out-of-state contractors who are interested in submitting bids (Govt's. Exhs. 1, 2 and 3, R. 112a-115a). In connection with any proposed large project, it is the regular practice of the Corps of Engineers to send out advance notice to approximately 400 general contractors, major subcontractors and suppliers, and this notice "always results in requests for sets of plans and specifications from several out-of-state contracting firms," in response to which sets are sent to "several firms outside the State of Virginia to enable them to prepare and submit bids"

(R. 115a). Since general contractors need more than one set, two or three sets of plans and specifications are sent upon request (*ibid.*). With respect to projects for the Army and Navy agencies, respondents have reason and knowledge to expect that copies of the plans and specifications furnished by them will be thus sent out-of-state to prospective bidders (R. 46a-47a).

There is, also, interstate transmission of plans, drawings and specifications for municipal governmental projects. The numerous surveys, drawings, plans, etc. for the approximately 50 individual projects for the Washington Suburban Sanitation Commission, located in Maryland (Jobs Nos. 893-893-3, 939-939-24; R. 23a, 26a-27a, 65a), were prepared in respondents' District of Columbia office and submitted to the Commission at its headquarters in Hyattsville, Maryland; in addition to the final plans, several drafts of preliminary plans and drawings relating to particular projects were thus transmitted out-of-state to the Commission for approval, examination, and suggestions (R. 65a).<sup>\*</sup>

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<sup>\*</sup>There is likewise considerable interstate transmission of plans and specifications for non-governmental projects to out-of-state bidders (R. 61a-62a), or to out-of-state representatives of important prospective tenants for approval (R. 58a-59a, 63a-64a). Where respondents' employees supervise the actual construction of the projects (for about 50 percent of their non-governmental clients, R. 15a), "shop drawings" on articles, materials, and equipment to be installed or used in the construction are submitted by subcontractors (through the contractor) to respondents, for checking and approval to make sure that the specifications are met. These drawings relate to such equipment and materials as doors, windows, floor material, bricks and prefabricated partitions. Some of the ma-



5. The decision below that none of respondents' employees is engaged "in commerce or in the production of goods for commerce" within the coverage of the Act rested, basically, on the ground that the preparation of plans and specifications by an independent architectural-engineering consultant firm is an "essentially local" business and that any interstate activities are "merely incidental to the local enterprise" (App. A, *infra*, p. 40). Although recognizing that the plans and specifications "consist of physical material" and that "many \* \* \* are transmitted across state lines" (*id.* at 32), the Court of Appeals held that their preparation was not production of "goods" for "commerce" within the meaning of the statutory definitions because they are "only a written embodiment of professional advice \* \* \* specifically prepared to meet the particular problem of a specific client and are not sold or offered for sale to the public generally" (*id.* at 35). The admitted direct and substantial participation in interstate communications and transmission of information and materials, and interstate travel, by individual employees, and their work in preparing plans and specifications for specific interstate projects, were held to be outside the scope of the Act on the ground that "[a]ll of these activities related to the production of plans,

materials or equipment is submitted in the form of samples. After the drawing or samples have been checked and/or corrected they are returned to the contractor and then sent back to the manufacturer or supplier. According to an employee in the Norfolk office, one-half of the drawings examined and corrected by him were from manufacturers located outside the State of Virginia (R. 81a-83a).

partook of their intrastate character and cannot be fairly characterized as commerce between States" (*id.* at 41).

#### REASONS FOR GRANTING THE WRIT

The decision below, in its ruling that respondents' employees are not engaged "in commerce" under the Fair Labor Standards Act, conflicts directly with the decision of the Court of Appeals for the Eighth Circuit in *Mitchell v. Brown Engineering Co.*, 224 F. 2d 359, certiorari denied, 350 U. S. 875, and is also in conflict with decisions of other Courts of Appeals in closely analogous cases. In its construction of both the "in commerce" and the "production of goods for commerce" phases of the Act's coverage, the decision is inconsistent with this Court's rulings. The issues presented would be of large importance even if their impact were limited to workers employed by similar architectural-engineering consultant firms. But the importance of the issues is greatly magnified by the implications of the opinion which would affect the Act's coverage of numerous employees in many other types of businesses which might with equal, or more, reason be characterized as "essentially local."

1. The Fourth Circuit's decision is in direct conflict with that of the Court of Appeals for the Eighth Circuit in *Mitchell v. Brown Engineering Co.*, *supra*, which involved the coverage of precisely the same type of employees of a firm engaged in precisely the same kind of consultant architectural and engineering business, except that the Brown Engineering firm limited its operations to projects within the same state and

had no out-of-state branch offices or associates.<sup>5</sup> The Eighth Circuit held that the Brown firm's non-professional employees were engaged "in commerce" by reason of their participation in the preparation of plans and specifications for projects for the repair and improvement of instrumentalities of commerce (roads, highways, and power plant facilities), and therefore that court did not need to determine whether they were also engaged in "production of goods for commerce." The court rejected the contention, strenuously urged there with much more reason than the facts of the instant case would justify, that consultant architectural-engineering work is an "essentially local" business and that the preparation of plans and specifications for improvement or repair of interstate instrumentalities and facilities was too remote from interstate commerce to be within the scope of the Act's coverage.

In contrast to the Fourth Circuit's erroneous concept of the nature of this type of business, the Eighth Circuit, in accord with the guiding principles of this Court's decisions, viewed the preparation of plans and specifications "in a practical aspect in relation to the whole construction project" for which they were specifically designed. It concluded that, thus viewed, such work is no more "isolated, local activity" than "actual manual labor on the projects under repair and improvement" and is "in practical effect" as direct and vital a part of the project for improvement of the instrumentalities or facilities of interstate com-

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<sup>5</sup> The opinion below recognizes the conflict with the Eighth Circuit (App. A, *infra*, p. 43).



merce as the physical construction work which depends entirely upon, and is directly guided in every detail, by such plans and specifications. The significance which the Fourth Circuit attaches to the "independent enterprise" of the employer is specifically in conflict with the Eighth Circuit's ruling that this factor "is of minor significance", in view of the settled principle that coverage is "determined on the basis of the employee's activity and not by the nature of the employer's business" (224 F. 2d at 365).

2. As the court below itself appears to agree (App. A, *infra*, p. 41), its decision, apart from this "independent enterprise" factor, also runs counter to the decisions of the Second and Ninth Circuits in *Laudadio v. White Construction Co.*, 163 F. 2d 383, and *Ritch v. Puget Sound Bridge and Dredging Co.*, 156 F. 2d 334. The Courts of Appeals there held that the Act covered draftsmen and clerical workers preparing the plans and drawings for, as well as the workers engaged in the actual construction of, projects for the improvement and expansion of interstate instrumentalities.\* In opposition to the Fourth Circuit's view that the Act's coverage is limited to employees participating "actively at the site of construction" (App. A, *infra*, p. 43), the Ninth Circuit in the *Ritch* case ruled that no such distinction could rationally be drawn between the so-called "white collar" workers (the

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\* The project in the *Laudadio* case was extension of runways at a naval air base, and the project in *Ritch* was dredging channels for the improvement of the harbor at the Bremerton Navy Yard, i. e., both projects of the same kind that comprise a primary part of the business of the respondent Lublin, McGaughy firm.

“draftsmen engaged in designing and laying out the work to be done by others”) and the workers engaged in the actual dredging and construction operations which were performed “all pursuant to the draftsmen’s plans.””

Similarly, the ruling below that the Act does not cover the employees’ regular and extensive interstate communications and interstate travel, required by reason of the multi-state nature of the respondent firm’s organization and operations, is inconsistent with the reasoning of the recent decisions of the Eighth and First Circuits in *Mitchell v. Kroger Co.*, 248 F. 2d 935 (C. A. 8), and *Aetna Finance Co. v. Mitchell*, 247 F. 2d 190 (C. A. 1). *Kroger* involved the coverage of interstate travel and interstate communications of auditors employed by a multi-state chain organization to make audits at its local retail units in two states, and to transmit their auditing reports to branch headquarters. Pointing out that such communication and

‘The narrow view expressed in the ruling below is also contrary to the Fourth Circuit’s own earlier decision in *Bennett v. V. P. Loftis Co.*, 167 F. 2d 286. In that case, the court held the nightwatchman guarding a road bridge under construction to be engaged “in commerce” within the coverage of the Act, “although [the watchman] took no part in the actual construction of the bridge in the sense of driving nails, or pouring concrete, or the like,” on the specific ground that (167 F. 2d at 288):

“If the declared purpose of the Act is to be accomplished, a project should be considered as a whole, in a realistic way; not broken down into its various phases so as to defeat the purpose of the Act. This latter unrealistic approach was condemned by the Supreme Court in *Walling v. Jacksonville Paper Co.*, 317 U. S. 564. [Emphasis added.]”

travel are “‘transportation, transmission and communication’ between states within the meaning and the literal terms of the statute” (248 F. 2d at 939), the Eighth Circuit held that there is “nothing to justify Congressional intent to the contrary,” and that, “[i]nstead of a strict or limited construction,” this Court’s decisions required “a liberal construction” of the statutory terms of coverage—in particular a construction that does “not narrowly circumscribe the meaning of the phrase ‘engaged in commerce’ or detract in any way from the statutory definition as to the meaning of commerce itself” (*id.* at 938, emphasis added). *Kroger* held not only that the auditors’ interstate communication and travel were “literally within the Act’s coverage” (*ibid.*), but also, on the basis of practical facts comparable to those here, that such interstate communication and travel were not “merely incident to a local retail business” but were “a part and parcel of the Kroger Company’s interstate activity” (*id.* at 939). In *Aetna Finance*, the First Circuit held that employees of a branch office of a small loan company were engaged “in commerce” by reason of their interstate communication, correspondence and transmission of various reports and documents, even though over 95% of the branch office’s business consisted of loans to local borrowers within the same state. The court found no difficulty in agreeing with the District Court’s ruling that coverage of these activities was sufficiently sustained *either* by reason of the small proportion of the branch’s business with out-of-state borrowers *or* by reason of the relationship of the



branch employees' work "to the conduct and furtherance of defendant's nationwide business" under the "broad guiding principles" of this Court's decisions (247 F. 2d at 192, affirming 144 F. Supp. 528 at 533).<sup>9</sup>

3. The Fourth Circuit's decision is likewise inconsistent with this Court's decisions construing the coverage of the Act and establishing the guiding principles for determining whether particular employees are covered.

(a). The decision rests mainly, if not solely, upon a supposed analogy between the instant case and *10 East 40th Street v. Callus*, 325 U. S. 578, on the unsubstantiated premise that a consulting architectural and engineering business of the type here involved is "essentially local." Apart from the error in the court's view of respondents' business as "essentially local" (see *supra*, pp. 4-6, 8-10; *infra*, pp. 24, 26, 45-47), *Callus* lends no support to the conclusion that individual employees engaged substantially and directly in interstate activities are excluded from the Act's coverage if the employer's business is shown to be an "essentially local" enterprise. On the contrary, this Court has specifically and repeatedly held that "the applicability of the Act is dependent on the character of the employee's work," and therefore "the fact that all of respondent's [employer's] business is not shown to

<sup>9</sup> The ruling below on interstate communication is also in conflict with the decision of the District Court in *Durkin v. Joyce Agency, Inc.*, 110 F. Supp. 918, which was affirmed *per curiam* by this Court *sub nom. Mitchell v. Joyce Agency, Inc.*, 348 U. S. 945, reversing the Seventh Circuit's decision (211 F. 2d 241), which had held specifically, *inter alia*, that so-called "internal" interstate communication was not within the coverage of the Act.

have interstate character is not important" (*Walling v. Jacksonville Paper Co.*, 317 U. S. 564, 571-572; *Kirschbaum Co. v. Walling*, 316 U. S. 517, 524). The ruling below is also inconsistent with the well-settled principle, most recently reemphasized in *Mitchell v. Vollmer & Co.*, 349 U. S. 427, that the statutory terms of coverage of this Act must be given a "liberal" construction, and that the literal terms of the statutory definitions should be accorded the "breadth of coverage" consistent with the "terms of substantial universality" in which the broad purposes of the Act are stated (*Powell v. United States Cartridge Co.*, 339 U. S. 497, 516).

Specifically, *Callus* is not an authority for excluding employees from the coverage of the Act simply because they are employed by an "independent enterprise" performing work "for a general miscellany of clients" (App. A, *infra*, pp. 42-43). In no respect material to the Act's coverage can either the employer's enterprise or the employees' activities in this case be likened to *Callus*, where neither the employer nor the employees engaged directly in any interstate activities and where the claim of coverage rested solely upon "thin" evidence of relationship to interstate manufacturing carried on by some of the building tenants elsewhere. Even on the "thin" evidence there presented, *Callus* found the question of coverage to be a very close one. Plainly, no such close borderline question is presented with respect to respondents' employees who are admittedly engaged directly and substantially in interstate "transporta-

tion, transmission, or communication" within the literal terms of the statutory definition.

The Fourth Circuit's extension of *Callas* is not only inconsistent with the principles established by this Court's jurisprudence on the coverage of this Act, but it is also contrary to decisions applying these principles to employees of independent enterprises dealing with a miscellany of customers. Thus in *Roland Electric Co. v. Walling*, 326 U. S. 657, the Court upheld coverage of employees of an independent electrical contracting company serving a general miscellany of customers, on the basis of evidence that the employees regularly performed work for 33 customers (out of a total of approximately 1,000) who were engaged in commerce or in production of goods for commerce. See also *Schulte Co. v. Gangi*, 328 U. S. 106, 118, sustaining coverage even of *building maintenance* employees in an independently operated building tenanted by a general miscellany of occupants, where the evidence showed that a sufficiently substantial proportion of the occupants were regularly engaged in producing various kinds of goods for shipment in interstate commerce.

The coverage ruling of *Roland Electric* was expressly approved by Congress at the time of the enactment of the 1949 amendment to the Fair Labor Standards Act, as were other decisions upholding the coverage of employees of public utilities engaged in supplying fuel, power and water to customers generally, among whom were substantial customers using such fuel, power or water in the production of other goods



for commerce or in the operation of instrumentalities of commerce. See Statement of the Majority of the Senate Conferees (95 Cong. Rec. 14874-75), which says that the work of such employees is covered by the Act "*whether they are employed by the producer of goods or by someone else who has undertaken the performance of particular tasks for the producer*" (*ibid.*, emphasis added). Similarly, the House Managers' report stated that the 1949 Amendments "are not intended to remove from the Act maintenance, custodial, and clerical employees" of the type held covered in *Kirschbaum* and in the public utility decisions, also expressly stating that such employees "will remain subject to the Act, notwithstanding they are employed by an independent employer \* \* \*" (95 Cong. Rec. 14929, emphasis added). While these statements were made with reference to the "production for commerce" phase of coverage (which was the coverage provision modified by the 1949 Amendments), the statements were obviously premised on a principle equally applicable to determining coverage of the "in commerce" phase, i. e., that the determining factor is the relationship of the *employee's work* to the interstate commerce regardless of the independent character of the *employer's enterprise*.

(b). The ruling below that the plans, specifications and similar materials are not "goods", and therefore the work of preparing and assembling them for transmission in interstate commerce is not "production of goods for commerce", is based on reasoning which is contrary to *Western Union Telegraph Co. v. Lenroot*, 323 U. S. 490; *Powell v. United States Cartridge Co.*,

339 U. S. 497; *Borden v. Borella*, 325 U. S. 679; and *Alstate Construction Co. v. Durkin*, 345 U. S. 13.

First, the view that plans and specifications are not "goods" simply because they represent the "embodiment of ideas" (App. A, *infra*, p. 37) is difficult to reconcile with the *Western Union* ruling that "telegraphic messages are clearly 'subjects of commerce' and hence that they are 'goods'" within the scope of the statutory definition, since prior to the adoption of the statutory definition it had been held (in *Western Union Telegraph Co. v. Pendleton*, 122 U. S. 347) that "'ideas, wishes, orders, and intelligence' are 'subjects' of the interstate commerce in which telegraph companies engage" (323 U. S. at 502-503). The physical embodiment of mental ideas into tangible and bulky plans and specifications is obviously the product of considerable routine, clerical and other physical work; as is evident from a mere glance at some of the plans and specifications for industrial projects involved in this case. These physical products are tangible materials which can be and are "subjects of commerce" (*i. e.*, interstate "transportation" or "transmission") within the literal terms of the statutory definitions; and their production unquestionably requires the type of routine, clerical, and physical workers with whom this Act is primarily concerned.

Second, the view that such work is outside the contemplation of the Act because *incidental* to professional planning and advice is contradicted by the *Borden* case, *supra*, where maintenance employees of Borden's central office building for its executive

officers and administrative employees were held within the Act's coverage, on the ground that the "economic production" with which this Act is concerned includes "not simply the manual physical labor involved in changing the form or utility of a tangible article" but also "planning and controlling" and the work of one "who conceives or directs a productive activity" (325 U. S. at 683). The apparent confusion by the court below of the Act's "professional" exemption (Section 13 (a) (1)) with the Act's general coverage provisions is contrary to this Court's explicit statement that: "Indeed, the fact that § 13 (a) (1) specifically excludes \* \* \* those employees employed in a bona fide executive, administrative or professional capacity is clearly consistent with the conclusion that these activities are included within" the coverage of the Act, and "that full effect should be given that fact unless otherwise provided" (325 U. S. at 684).\*

Third, the view that plans and specifications are not "goods for commerce" because they lack the characteristics of ordinary articles sold commercially to the public generally (App. A, *infra*, pp. 35-36, 37-38) is contrary to the basic rationale of *Powell*, which explicitly repudiated the contention that coverage is limited to "commercial" transactions or to "articles that are intended for sale, exchange or other trading activities" (339 U. S. at 512), while emphasizing the "terms of substantial universality" in which the broad statutory purposes and the statutory coverage definitions are stated (*id.* at 509-516).

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\* The "professional" exemption is not involved in the present case. See footnote 2, *supra*, p. 4.



Finally, the reasoning below is inconsistent with *Alstate Construction Co., supra*, since the preparation of plans and specifications specifically for use in the improvement of interstate facilities cannot be distinguished from the preparation of road materials for these same purposes, except on the unwarranted assumption that the statutory definition of "goods" is limited to "products" ordinarily sold to the public. The preparation of the plans and specifications for a specific highway improvement project, no less than the preparation of the road materials pursuant to those plans and specifications, directly serves the interstate commerce on that highway. While the road materials may be physically incorporated into the road, the plans and specifications guide and determine the execution of the improvement in every detail from the beginning to the end of the construction work. Both "serve commerce" and are produced specifically and directly "for commerce" in the same degree.

4. The Fourth Circuit's reliance on the paragraph in the Labor Department's Interpretative Bulletin relating to employees of a "local architectural firm" (see App. A, *infra*, p. 36) is misplaced. The term "local architectural firm," and the paragraph in the Interpretative Bulletin, are patently not descriptive of respondents' multi-state practice or of its extensive engineering operations. The statement in the bulletin is merely a restatement (indeed, a quotation) of legislative history from the House Conferees' Report on the 1949 Amendments, which refers only to "the preparation of plans for the alteration of buildings

*within the state* which are used to produce goods for interstate commerce." (95 Cong. Rec. 14929, par. 5, emphasis added.) It is expressly limited to a "local" business conducted *within the confines of a single state* and related to interstate commerce only indirectly and remotely by reason of the fact that some of the local buildings for which it prepares plans may be "used to produce goods for interstate commerce." This is hardly descriptive of respondents' architectural-engineering enterprise which is not only specifically organized so as to conduct its operations across state lines, but is also engaged extensively in work for out-of-state projects and out-of-state clientele, and, in addition, engages directly and substantially in work for the improvement and expansion of interstate instrumentalities and facilities. The content of the term "local architectural firm" is evident from the other examples cited in the legislative history immediately preceding and following the reference to a "local architectural firm"—i. e., "a local independent nursery concern" whose business might include "mowing the lawn around the plant of a customer *within the state* engaged in producing goods for interstate commerce," and "a local exterminator service firm" whose employees "work *wholly within the state*" serving generally "buildings *within the state*" some of which may be "used to produce goods for interstate commerce" (95 Cong. Rec. 14929, emphasis added)."

"The court also relies (App. A, *infra*, p. 36) on footnote 28 of the Bulletin which contains a "see also" citation of *McComb v. Turpin*, 81 F. Supp. 86 (D. Md.). The Fourth Circuit's construction of this "see also" citation as an administrative acceptance and adoption of the reasoning and hold-

5: The importance of the issues presented, even if their impact were limited to employees of similar architectural-engineering firms, is evidenced by the number and size of such firms and the extent to which their business depends upon interstate operations in the modern industrial pattern. While official up-to-date statistics are not available, a recent comprehensive survey of the private practice of engineering in the United States by the publication *Consulting Engineer*,<sup>11</sup> together with some statistics for earlier years in Government reports, leaves no doubt that there are thousands of non-professional employees in this field. According to a 1953 report of the Departments of Commerce and Health, Education and Welfare, 12,219 architectural-engineering consultant firms reported on employees to the Bureau of Old Age and Survivors Insurance, and listed a total of almost

ing of that decision is, we submit, far-fetched and unwarranted. Even if the citation of that decision could be construed as an administrative acceptance of it, the factual record in the instant case is so different in crucial respects as to preclude any inference that the firm here involved qualifies as a "local architectural firm" within the meaning of the bulletin. As the opinion in the *Turpin* decision repeatedly emphasized, "the stipulation of facts [which was the sole evidence in that case] furnishes only meager information" (81 F. Supp. at 91), showing only that the employees' services related mostly "to the original construction of buildings rather than to additions or alterations" (*id.* at 88), and, particularly, that it was "not contended in this [the *Turpin*] case that any of the defendants' employees are engaged in interstate commerce" as distinguished from the "production of goods for commerce" (*id.* at 88; see also 90, 92, 94; emphasis the court's). It was because of the meagerness and deficiencies in the record that the decision not to appeal the *Turpin* case was made.

<sup>11</sup> *Consulting Engineer*, January 1957 issue, pp. 86-92; February 1957 issue, pp. 77-82.



130,000 employees for the mid-March payroll period.<sup>12</sup> The *Consulting Engineer's* 1957 survey of the engineering profession shows that the average size of engineering firms is 31 persons, about two of whom are principals and the remainder about evenly divided between engineering and non-engineering employees (January issue, pp. 87-88). At peak periods, the average figure is about 50 persons, many firms, of course, employing a much larger number than this average, one or two of the largest firms having as many as 25,000 to 30,000 non-engineering employees during peak periods (*id.* p. 87). The survey also reports that 20 percent of the engineering firms also do architectural work to some extent and that the trend is toward combining both services in one firm (February issue, p. 77).

Contrary to the assumption by the court below that the business of such firms is "essentially local," the *Consulting Engineer's* survey reports that most of the firms in this field do *not* limit their operations to any one state; 72 percent of the engineering consulting firms are active in more than one state, and 28 percent have expanded their geographical range to foreign projects. The survey emphasizes that "consulting engineers are greatly expanding their geographical range," the situation being "quite different" today from "the scope of operations of firms

<sup>12</sup> United States Summary Part I County Business Patterns, Reporting Units, Employment, and Taxable Payrolls by Industry Groups under Old Age and Survivors Insurance Program Published by U. S. Department of Commerce and U. S. Department of Health, Education, and Welfare Table 1-A, p. 6.

when first organized," at which time 53% of the firms (in contrast to only 28% today) limited themselves to operation within one state. The survey adds: "This geographical expansion will continue. In fact 12 percent indicated that they plan to expand further their geographical fields of operation. Of these about two-thirds indicated that they planned to change from intra- to inter-state operation, while one-third plan to go into foreign work." (February issue, p. 79).

In addition to this expansion into direct interstate operation, the survey shows that industrial work (particularly for federal, state, and municipal governments) constitutes a major part of the business in this field and is constantly increasing. As of the time of the survey, 29% of the consulting engineering firms were doing work for the Federal Government, 28% for state governments, and 44% for local governments, and in every section of the country "a higher percentage of firms are increasing their work for Federal Government than are reducing their work for this client."<sup>13</sup> Some indication of the substantiality of this type of work is evidenced by the expenditures of the Army and Navy for architectural and engineering contract work during the year 1957, which totaled over \$113,000,000 (on almost 2,000 contracts for \$10,000 or more each).<sup>14</sup> Undoubtedly a large proportion of this work consists of the preparation of plans and specifications for interstate in-

<sup>13</sup> February issue, p. 81, Table 4, p. 82.

<sup>14</sup> This data was obtained from the Office of the Assistant Secretary of Defense for Supply and Logistics, Division of Review and Analysis.

strumentalities and facilities of the type that comprise a major part of the respondent Lublin, McCaughy firm's business (*supra*, p. 6, *infra*, pp. 45-47). Another major source of the business of such firms is highway construction. According to the Annual Report of the Bureau of Public Roads for Fiscal Year 1955, the state highway departments had committed 3.5 million dollars for fees to private engineering firms in connection with their federally-aided road projects alone (Annual Report, p. 7). This type of business will, of course, be considerably increased under the gigantic road construction program initiated by the 24 billion dollar Federal-Aid Highway Act of 1956 (Public Law 627—84th Cong., 2nd Sess., 70 Stat. 374). The Department of Commerce has estimated that the cost of preliminary engineering (surveys, detail plans, specifications and contract documents) required for this program will exceed 1¼ billion dollars (House Document No. 300, 85th Cong., 2nd Sess., p. 4, Table C, p. 6).

#### CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

J. LEE RANKIN,  
*Solicitor General.*

STUART ROTHMAN,  
*Solicitor,*

BESSIE MARGOLIN,  
*Assistant Solicitor,*

EUGENE R. JACKSON,  
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FEBRUARY 1958.



## APPENDIX A

### OPINION OF THE COURT OF APPEALS

United States Court of Appeals for the Fourth  
Circuit

No. 7488

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED  
STATES DEPARTMENT OF LABOR, APPELLANT

v.

LUBLIN, McGAUGHY AND ASSOCIATES, A CO-PARTNER-  
SHIP, AND ALFRED M. LUBLIN, JOHN B. McGAUGHY,  
WILLIAM T. McMILLAN AND WILLIAM MARSHALL,  
JR., INDIVIDUALLY AND DOING BUSINESS AS LUBLIN,  
McGAUGHY AND ASSOCIATES, APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE EASTERN DISTRICT OF VIRGINIA, AT NORFOLK

(Argued October 23, 1957. Decided November  
25, 1957)

Before PARKER, Chief Judge, and SOPER and HAYNS-  
WORTH, Circuit Judges

Bessie Margolin, Assistant Solicitor, United States  
Department of Labor (Stuart Rothman, Solicitor,  
Eugene R. Jackson, Attorney, and Jeter S. Ray, Re-  
gional Attorney, United States Department of Labor,  
on brief) for Appellant, and Robert C. Nusbaum and  
Alan J. Hofheimer for Appellees.

**SOPER, Circuit Judge:**

The Secretary of Labor brings this suit under the Fair Labor Standards Act, as amended,\* against Lublin, McGaughy and Associates, a co-partnership, and against the individual members of the firm who are architects and engineers with a main office in Norfolk, Virginia, and a branch office in Washington, D. C. The complaint charges that the defendants have violated various sections of the statute, in that they have employed many persons in interstate commerce and in the production of goods for interstate commerce for workweeks longer than forty hours without compensating them for the excess hours of employment at rates not less than one and one-half ( $1\frac{1}{2}$ ) times the regular rates at which they were employed, in violation of §§ 7 and 15 (a) (2) of the statute; and in that they have failed to keep adequate records of their employees' wages and hours and other conditions—as prescribed by the Federal Regulations—in violation of §§ 11 (e) and 15 (a) (5) of the Act; and in that they have transported goods in interstate commerce, in the production of which many of their employees had been employed, in violation of § 7 of the Act. An injunction was prayed restraining the defendants from further violation of the statute. The District Judge, after hearing, denied the relief prayed, resting his decision in large part on the conclusion that the plans and specifications prepared by the firm were not “goods” within the meaning of the Fair Labor Standards Act.

The principal questions to be considered grow out of the contentions of the Government: (1) that the drawings, plans and specifications prepared by the employees of the firm are “goods” and that the prep-

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\*Act of June 25, 1938, ch. 676, as amended by the Fair Labor Standards amendments of 1949, ch. 736; 29 U. S. C. § 201 et. seq.

aration thereof is "production of goods for commerce" within the meaning of § 3 of the statute; and (2) that the employees of the firm who participated in interstate travel and communications required for the conduct and co-ordination of the firm's offices in Norfolk and Washington were "engaged in commerce" within the meaning of § 7 (a) of the statute; and (3) that a large part of the work of the firm's draftsmen, fieldmen and clerical employees is so closely related to projects for the improvement, expansion or replacement of interstate instrumentalities as to bring them within the "in-commerce" coverage of the Act. The Government recognizes that employees engaged in a professional capacity are exempted by § 13 of the statute, but seeks to bring the non-professional employees of the firm within the coverage of the Act.

The defendants, who reside in Norfolk, are architectural and consulting engineers. They have worked and are now employed on numerous projects in Virginia, Maryland and the District of Columbia, and have worked on some projects in North Carolina and overseas. They include, primarily, projects for the improvement, enlargement and repair of installations at military bases, airfields, shipyards and radio stations for the United States military services, and also a substantial number of state and municipal undertakings and projects. These activities require constant co-ordination and communication, as well as transmission of information and materials between the two offices. In general, the defendants collect the necessary data for the projects, confer with their clients in regard thereto, and prepare the drawings, estimates and surveys which are used in connection with the projects. They also supervise and inspect the construction from an architectural and engineer-



ing standpoint by furnishing surveying and engineering services to contractors while construction is in progress.

To perform this work the defendants have about thirty employees in the Norfolk office and twenty employees in the Washington office, including architects, engineers, draftsmen, fieldmen, office managers, stenographers and bookkeepers. This action is concerned only with the nonprofessional employees consisting of draftsmen, fieldmen, clerks and stenographers.

In the course of the business necessary surveys and typographical maps are made and then the draftsmen, working under the supervision of the engineers and architects, prepare the drawings and designs from which blueprints are reproduced. The drawings, together with explanatory specifications, contain the information necessary for estimating the cost, financing the project, the bidding of contractors, and guidance to the contractor in constructing the project. The military, governmental and commercial structures on which the defendants are now and in recent years have been engaged are intricate in design and construction and could not be constructed without the plans and specifications prepared by the employees, many of which are transmitted across state lines. They consist of physical material of negligible value in itself, though, as copies of the master drawings, they contain information which may be of substantial value to the particular client in the construction of the project and in planning subsequent alteration and repair. It is estimated that on the average, one-half of the charges of the defendants for their architectural and engineering services is for work upon the master drawings and specifications and in the development of information embodied in them.

The plans, specifications and estimates prepared for government agencies, which comprised the greater part of the defendants' work, are submitted to these agencies and become their property. Frequently numerous copies of the specifications and drawings are required. The advertisement of a proposed government project results in requests for sets of plans and specifications from out-of-state contracting firms and these are sent by the Government to the prospective bidders to enable them to prepare and submit bids. When required by the terms of the contract the defendants furnish copies of the specifications and drawings which are reproduced by an outside blueprint company. For commercial clients copies of the drawings and specifications are furnished while the originals are retained by the defendants in case additional copies are needed. These copies are also obtained from commercial blueprint establishments at an additional cost to the clients.

The fieldmen include surveyors, transit men and chain men who work under the supervision of a professional engineer. They survey boundaries, take borings, etc. at the work site, frequently traveling from the District of Columbia to the site in Maryland and returning to the defendants' office in Washington in connection with their duties. They have little or no duty in the office but gather the material and bring it to the office as a basis for the preparation of the drawings and specifications. Some of the field work was done on projects for the Washington Suburban Sanitation Commission located in Maryland to which a large part of the time of the firm's Washington office has been devoted for the period of a year. A survey party reports to the Washington office each morning, drives to Maryland with the necessary field books and field equipment, makes surveys and gathers data, which is brought back to

the Washington office at the end of each day and turned over to the draftsmen. For approximately 50 per cent of their commercial clients, for whom a minor part of defendants' work is performed, the defendants supply employees who supervise the construction of the project so as to determine whether the construction is proceeding in accordance with the plans and specifications. An additional charge is made for this type of work.

Projects for the improvement or repair of interstate instrumentalities on which the defendants have worked include airfields and airplane facilities for which streets are widened or constructed, hangars are repaired or altered, and extensions are built. Radio and television facilities are relocated, repairs to government buildings at shipyards and machine shops are made, and other work in Maryland, Virginia and North Carolina is constructed.

Stenographers type letters, specifications and other documents, some of which are mailed to points out of the state. Some of the employees handle telephone calls, and some of those calls are from and to localities out-of-state. Payroll data for employees in the Washington office is mailed bimonthly to Norfolk where payroll checks are prepared and returned to Washington through the mail. Employees of the book-keeping department, who prepare vouchers for the payment of bills of the defendant, prepare those for out-of-state as well as local creditors.

We consider first the contention of the Government which goes to the heart of the case, that the plans, drawings, specifications and blueprints prepared by the non-professional employees of the defendants are "goods" within the meaning of § 3 (1) of the Act where the term is defined as "goods, wares, products, commodities, merchandise, or articles or subjects of commerce of any character." The District Judge



held to the contrary, following the decision in *McComb v. Turpin*, D. C., Md., 81 F. Supp. 86, where, as in the pending case, an injunction was sought to prevent violation of the statute by architects and consulting engineers. One of the contentions of the Government was that the mere preparation of plans intended to be sent by mail, express or messenger to a client in another state constitutes production of goods for commerce. On this point, Judge Chesnut said (pp. 88 and 89):

\* \* \* This can be true only if the definition of the word "goods" as contained in the Act is construed to cover the preparation of the plans, drawings and specifications referred to in the stipulation. The definition [§ 203 (i)] defines "goods" to mean "goods \* \* \* wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof." I do not think even this broad literal definition could fairly be construed to apply to the plans, drawings and specifications prepared by or under the supervision of the defendants or their employees. They are only a physical embodiment in words of professional conclusions.

Certainly the word "goods" could not be construed to include professional advices and its definition should not be construed to include the typewritten or mechanical expression by which the advice is given. These plans, drawings and specifications are not themselves the subject of barter or sale, but only the written embodiment of professional advice, and incidental thereto. They are specifically prepared to meet the particular problem of a specific client and are not sold or offered for sale to the public generally. They are, of course, quite unlike stocks, bonds and commercial paper which are themselves instrumentalities

of commerce. *Bozant v. Bank of New York*, 2 Cir., 156 F. 2d 787. This distinction was well made by Circuit Judge Learned Hand in the case just cited, 156 F. 2d at page 789 as follows:

"Some of the activities which went on, we agree, should on no theory be counted. A lawyer who is in the course of his practice writes letters, or draws deeds or wills, or prepares briefs and records, is not on that account within § 203 (j); and the same is true of the correspondence of a broker and of a banker. The definition of 'goods' in § 203 (i) might literally go so far even as that; but it would be unreasonable to the last degree to suppose the Congress meant to cover such incidents of a business whose purpose did not comprise the production of 'goods' at all."

The Department of Labor cited this decision in its Interpretative Bulletin, Part 776, Subpart A, General (May, 1950), Title 29, Chapter V, Code of Fed. Reg. (776.19 (b) (2)), where it said:

On the other hand, the legislative history makes it clear that employees of a "local architectural firm" are not brought within the coverage of the Act by reason of the fact that their activities "include the preparation of plans for the alteration of buildings within the state which are used to produce goods for interstate commerce." Such activities are not "directly essential" enough to the production of goods in the buildings to establish the required close relationship between their performance and such production when they are performed by employees of such a "local" firm.

We are now told, however, that this pronouncement is no longer tenable because of the decisions of the Supreme Court in *Western Union Telegraph Co. v. Lenroot*, 323 U. S. 490 (January 8, 1945), and

*Powell v. U. S. Cartridge Co.*, 339 U. S. 497 (May 8, 1950). In the *Western Union* case the Supreme Court held that telegraph messages are "goods" within the meaning of § 203 (i) because they are "subjects of commerce", one of the terms in the inclusive list enumerated in the section. In the course of the opinion, the Supreme Court noted that in *Western Union Telegraph Co. v. Pendleton*, 122 U. S. 347, in declaring invalid a statute which attempted to regulate the activities of telegraph companies, it had held that intercourse between the states by telegraph messages amounts to interstate commerce in the transportation of "ideas, wishes, order, and intelligence". This holding, it is now said, demonstrates that the embodiment of ideas contained in plans and specifications are also "goods" within the meaning of the Act.

The *Powell* case held that munitions manufactured by a private contractor at a government plant were "goods", and that his employees were engaged "in the production of goods for commerce". Munitions were held to be "goods", because they were "products" within the meaning of § 203 (i) of the statute; and the employees were held to be engaged in the production of "goods" for commerce, although the munitions were not to be sold but used in the war, because of their "transportation" to destinations outside the state.

We do not think that these decisions require us to abandon the conclusion reached by Judge Chesnut and by Judge Hoffman in the pending case. The Department of Labor itself did not give this effect to the *Western Union* decision of 1945, notwithstanding the holding therein that the transportation of ideas embodied in tangible form may amount to commerce between the states. On the contrary, it issued its Bulletin in 1950 following the lines laid down by



Judge Chesnut. The practical distinction between the business of interstate communication by telegraph and the activity of making plans and drawings which are used merely as guides for building construction, is so obvious as not to deserve further discussion. Nor does the *Powell* case support the Government's position. It does show that the term "goods" in § 203 (i) of the statute is not limited to those bought and sold, but its holding that munitions of war are "goods" in no way tends to show that such articles as plans and specifications, which possess markedly different characteristics, are also "goods" in the statutory sense.

The defendants in this case were independent engineers and architects engaged in essentially local activity in each of the offices which they maintained. They were not employed to manufacture documents to be sold or transported in interstate commerce but to give professional advice and assistance which of necessity was given permanent form as plans or specifications so as to be available for guidance and reference. Clearly such plans were not "goods" in the ordinary case, although it is possible to conceive a situation in which standard plans or blueprints for building construction might be prepared for transportation or sale in such a way as to fall within the coverage of the Act. That, however, did not happen here. The copies of the plans that were made and sent out for the convenience of the clients and their bidders were not transported as subjects of commerce but in order to show the interested parties the sort of construction that was required; and the mere fact that the documents crossed state lines did not alter their inherent nature.

The second contention of the Government is based on the interstate travel and communication of the employees of the firm between its two offices and

between these offices and the locations of its out-of-state clients and their contractors. It is said that these activities constitute engagement "in commerce" even though the plans and specifications are not "goods" produced in commerce within the meaning of the Act; and many cases are cited in which the Courts have found that the transportation of documents and records as well as the travel of employees from state to state are forms of interstate commerce which subject the participants to regulation by Congress. Thus the Courts have pointed out that the use of the mails and other facilities of interstate commerce perform an important, if not a vital function in the operation of businesses which extend beyond state boundaries, e. g., a holding company in control of corporations operating in seventeen states, *North American Co. v. S. E. C.*, 327 U. S. 686, 694, 695; the production and presentment of theatrical attractions on a multistate basis, *United States v. Schubert*, 348 U. S. 222; the business transactions across state lines of a fire insurance company, *United States v. Underwriters Assn.*, 322 U. S. 533; the business of conducting schools by means of correspondence through the mails from state to state, *International Text Book Co. v. Pigg*, 217 U. S. 91; *Federal Trade Commission v. Civil Service T. Bureau*, 6 Cir., 79 F. 2d 113; and the business of communications itself by use of the telegraph, *Western Union Telegraph Co. v. Lenroot*, 323 U. S. 490, and by newspaper, *Associated Press v. N. L. R. B.*, 301 U. S. 103. Similar rulings involving the Fair Labor Standards Act have also been made where interstate communication was not the principal or direct aim and necessity of the enterprise but, nevertheless, performed an important function. Thus in *Donovan v. Shell Oil Co.*, 4 Cir., 168 F. 2d 229, it was held that a clerk who prepared payroll checks mailed to

employees in different states and kept personnel and statistical records in the office of an oil company concerned with the interstate transportation of petroleum products was engaged in commerce; and in *Durkin v. Joyce Agency*, D. C., N. D., Ill., 110 F. Supp. 918, 923; 348 U. S. 945, that clerks and switchboard operators employed by a warehouse corporation concerned with interstate transportation who used the telephone and mails in carrying on the business were engaged in interstate commerce, and in *Aetna Finance Co. v. Mitchell*, 1 Cir., 247 F. 2d 190, that employees of a loan company whose operation involved a constant flow of documents, information, etc., through the mails were engaged in interstate commerce. The transportation of persons from state to state in the course of business operations may also constitute interstate commerce, *Edwards v. California*, 214 U. S. 160; *Caminetti v. United States*, 242 U. S. 470; *Hemans v. United States*, 6 Cir., 163 F. 2d 228, 239; *Cleveland v. United States*, 329 U. S. 14.

It is manifest however, notwithstanding this well established line of authority, that the mere use of the mails and of transportation facilities across state lines is not necessarily interstate commerce. There must be some relation to a business which is interstate in character. This is found most clearly where the very essence of the business is interstate commerce itself, as in the sending of telegraph messages, and it also exists where the employer's business is interstate in character, as illustrated above, in the course of which interstate communication is a material part. But where the business is essentially local and there is no production of "goods", communication which is merely incidental to the local enterprise cannot be classed as commerce. The interoffice communication in this case related to the local production of plans and



specifications, and the fieldmen who travelled from state to state were sent out to get the information as to the character of the work to be done, so that the architects and engineers might do their preparatory work. All of these activities related to the production of plans, partook of their intrastate character, and cannot be fairly characterized as commerce between states.

Finally, the Government contends that it should prevail because the work of certain draftsmen, fieldmen and clerical employees relates to projects for the improvement, enlargement and repair of instrumentalities of interstate commerce, for the most part military installations, airfields, shipyards and radio facilities for the United States, as well as municipal governmental projects such as turnpikes and road improvements, and projects for private enterprise such as was done in the remodeling of Trailway Bus terminals in Washington and in Baltimore. Undoubtedly the term "in commerce" covers not only the activity of workers who share directly in the work of construction but also those who do the paper work, such as the preparation of lists of material or payrolls, or who serve as fieldmen and timekeepers on the job. In some cases there is reference to the preparation of plans or drawings for construction work by employees of the contractor as evidence that work "in commerce" is being performed. See *Laudadio v. White Const. Co.*, 2 Cir., 163 F. 2d 383, 386; *Ritch et al. v. Puget Sound Bridge & Dredging Co., Inc.*, 9 Cir., 156 F. 2d 334, 337; *Archer v. Brown*, 5 Cir., 241 F. 2d 663, 668; *Chambers Const. Co. v. Mitchell*, 8 Cir., 233 F. 2d 717, 723; *Mitchell v. Vollmer & Co.*, 348 U. S. 427. There is, however, no clean-cut holding that the work of employees of independent architects, such as are before us in this case, is "commerce" under the Act.

It may be that the activities of the employees in question constitute an indispensable link in the chain of causation whereby instrumentalities of commerce are extended or improved; but it does not follow that their work is so closely connected with interstate commerce as to be a part of it. In determining the question, the character of the work of the employees rather than the occupation of the employer is the controlling factor, but the occupation of the employer must nevertheless be taken into consideration, for the Act does not attempt to regulate local activity. This is most clearly shown by contrasting the decision of the Supreme Court in *Borden Co. v. Borrella*, 325 U. S. 679, with its decision in *10 E. 40th St. Co. v. Callus*, 325 U. S. 578, which were decided on the same day. In the first case it was held that the maintenance employees of a building owned and chiefly used for central offices by an interstate producer were within the regulated area as persons engaged in an occupation necessary to the production of goods for commerce; but in the second case it was held that employees doing the same kind of work in a metropolitan office building operated as an independent enterprise and used by every variety of tenants, including producers of goods for commerce, did not have such a close and immediate tie with the processes of production as to be covered by the Act. The Court said, 325 U. S. 583:

\* \* \* Mere separation of an occupation from the physical process of production does not preclude application of the Fair Labor Standards Act. But remoteness of a particular occupation from the physical process is a relevant factor in drawing the line. Running an office building as an entirely independent enterprise is too many steps removed from the physical process of the production of goods. Such remoteness is insu-

lated from the Fair Labor Standards Act by those considerations pertinent to the federal system which led Congress not to sweep predominantly local situations within the confines of the Act. To assign the maintenance men of such an office building to the productive process because some proportion of the offices in the building may, for the time being, be offices of manufacturing enterprises is to indulge in an analysis too attenuated for appropriate regard to the regulatory power of the States which Congress saw fit to reserve to them. Dialectic inconsistencies do not weaken the validity of practical adjustments, as between the State and federal authority, when Congress has cast the duty of making them upon the courts. Our problem is not an exercise in scholastic logic.

The partners in the pending case may be likened to the owners of the general office building in the *Callus* case. They did work for a general miscellany of clients in connection with construction projects, some of which were local in nature while others were such that the construction workers themselves were within the coverage of the Act. But the architectural work itself was local and of necessity gave color to the activities of their subordinates and took them outside the scope of the statute. It is this element which the Government and the decision in *Mitchell v. Brown*, 8 Cir., 224 F. 2d 359, upon which the Government relies, seem to ignore. For these reasons we do not think that the employees of the defendants were subject to the provisions of the statute. This is not to say that some employees of the firm may not have participated so actively at the site of construction as to be covered; and nothing in this decision is intended to preclude further proceedings as to them. There is however no sufficient showing of the nature



of their activities in the record in this case as to justify the issuance of an injunction.

*Affirmed.*

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*Judgment*

Filed and Entered November 25, 1957.

United States Court of Appeals for the Fourth  
Circuit

No. 7488

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED  
STATES DEPARTMENT OF LABOR, APPELLANT

*v.*

LUBLIN, MCGAUGHY AND ASSOCIATES, A CO-PARTNER-  
SHIP, AND ALFRED M. LUBLIN; JOHN B. MCGAUGHY,  
WILLIAM T. McMILLAN AND WILLIAM MARSHALL,  
JR., INDIVIDUALLY AND DOING BUSINESS AS LUBLIN,  
MCGAUGHY AND ASSOCIATES, APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE EASTERN DISTRICT OF VIRGINIA

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

MORRIS A. SOPER,  
*United States Circuit Judge.*

NOVEMBER 25, 1957.



## APPENDIX B

### RESPONDENTS' PROJECTS FOR IMPROVEMENT, REPAIR OR ENLARGEMENT OF INTERSTATE INSTRUMENTALITIES OR FACILITIES

#### 1. AIRFIELDS AND AIRPLANE FACILITIES

Widening streets on a naval operating base in the vicinity of the base motorpool and post exchange, and extending and paving plane taxiways and parking aprons at the Naval Air Station installation at Oceana, Virginia, which is a naval jet base and part of the East Coast defense system for intercepting enemy aircraft (Stip. R. 16a; Job No. 928, R. 25a). Replacing paving between hangars at the Naval Air Station at Norfolk, Virginia (Stip. R. 16a; Job No. 881, R. 22a). It was agreed at the trial that the Navy airplanes using both these facilities regularly fly across State lines (R. 84a).

Repair and alterations of hangars at the Naval Air Station at Oceana, Virginia (a naval jet air base, part of the East Coast defense system for intercepting enemy aircraft) (Jobs Nos. 892, 892-1; Stip. R. 16a, 22a, 23a); the Naval Air Station in Washington, D. C. (Job No. 963, R. 29a, repairs to three hangars); and the Naval Air Station at Norfolk, Virginia (Job No. 901, R. 23a) (alterations to Hangars LP4 and LP14); advance planning for runway extension, Byrd Field (Job No. 822, R. 20a); advance planning report for pneumatic test facility, Naval Air Station, Norfolk, Virginia (Job No. 921, R. 25a); estimates for

Pinecastle Air Force Base, Florida (Job No. 833, R. 21a); pile test, Langley Field, Virginia (Job No. 835, R. 21a); estimates for Beaufort, South Carolina, Airfield (Job No. 882, R. 22a); advance planning, Naval Air Station, Norfolk, Virginia (Job No. 748, R. 18a) and work relating to Patuxent Air Station, Maryland (Job No. 869, R. 22a).

## 2. SHIPYARDS

Repairs to buildings located at the United States Navy Ship Yard, Portsmouth, Virginia (Job No. 948, R. 28a—repairs to 10 buildings, and Job No. 952, R. 28a—repairs to buildings) and other miscellaneous projects (Jobs Nos. 853 and 903; R. 21a, 23a); repairs to Pier 12, Naval Operating Base, Norfolk, Virginia (Job No. 965, R. 29a); and work relating to the machine shops and administrative buildings at the Norfolk Navy Yard and Norfolk Naval Base, Norfolk, Virginia (Stip. R. 16a; Job No. 920, R. 25a).

## 3. RADIO AND TELEVISION FACILITIES

Relocation of the Coast Guard Radio Station at Oceana, Virginia (Job Nos. 785, 917, R. 19a, 24a). Making the necessary site examination and preparing the advance planning report for relocating the Coast Guard Radio Station at Oceana, Virginia, which is a part of the Oceana Naval Air facility. When the new station is completed, the old station will be abandoned. A letter of intent to proceed with the final plan and specifications for this project has been received by appellees from the Navy (R. 69a-70a). Work relating to television station WAVY, Portsmouth, Virginia. (Job No. 754, R. 18a).



#### 4. TURNPIKE AND ROAD IMPROVEMENTS, BUS TERMINAL REPLACEMENT AND WATER AND SEWER UTILITIES

Road improvements, Oceana, Virginia (Job No. 911, R. 24a); Richmond Turnpike (Job No. 814, R. 20a); Old Dominion Turnpike Authority (Job No. 847, R. 21a); road survey, Columbia, North Carolina (Job No. 788, R. 19a). Replacement of the Trailways Bus Terminal in Washington, D. C. (R. 90a). Numerous water and sewer designs for the Washington Sanitary Commission (Job Nos. 893, 893-1 through 893-3, 939, 939-1 through 939-24; R. 23a, 26a-27a).

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**In the Supreme Court of the United States**

**OCTOBER TERM, 1958**

**JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED  
STATES DEPARTMENT OF LABOR, PETITIONER**

**v.**

**LUBLIN, McGAUGHY & ASSOCIATES, ET AL.**

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE FOURTH CIRCUIT**

**BRIEF FOR THE PETITIONER**

**J. LEE RANKIN,**

*Solicitor General,  
Department of Justice,  
Washington 25, D. C.*

**STUART ROTHMAN,**  
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*Department of Labor, Washington 25, D. C.*

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# **In the Supreme Court of the United States**

**OCTOBER TERM, 1958**

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**No. 37**

**JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED  
STATES DEPARTMENT OF LABOR, PETITIONER**

**v.**

**LUBLIN, MCGAUGHY & ASSOCIATES, ET AL.**

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**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE FOURTH CIRCUIT**

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**BRIEF FOR THE PETITIONER**

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The judgment of the Court of Appeals was entered on November 25, 1957 (R. 154a). The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

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Respondents are partners in a consultant architectural-engineering business—with offices in Norfolk, Virginia and in Washington, D. C., and foreign asso-

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## **QUESTION PRESENTED**

Respondents are partners in a consultant architectural-engineering business—with offices in Norfolk, Virginia and in Washington, D. C., and foreign asso-

ciates overseas—engaged in preparing plans and specifications essentially for industrial, as distinguished from residential, projects. A substantial proportion of their work is for out-of-state clientele or projects, and the great bulk of it consists of the preparation of plans and specifications for federal, state and municipal governmental projects, many of which are for the improvement, repair, or enlargement of interstate instrumentalists or facilities.

The question presented is: Whether respondents' non-professional employees (draftsmen, fieldmen, and clerical workers)—who work on the plans and specifications for projects for improvement of interstate instrumentalities or facilities, and whose regular duties also include the preparation of drawings, plans, specifications, etc., transmitted across state lines, or direct and substantial interstate communication by telephone and correspondence, or travel across state lines—are engaged "in commerce or in the production of goods for commerce" within the meaning of the Fair Labor Standards Act.

#### STATUTE INVOLVED

Pertinent provisions of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended, c. 736, 63 Stat. 910 (29 U. S. C. 201, *et seq.*), are set forth in full in the record (R. 116a-119a). The provisions particularly involved here are Sections 3 (b), (i), and (j), as follows:

SEC. 3. [52 Stat. 1061; 63 Stat. 911]. As used in this Act—

\* \* \* \* \*

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among



the several States or between any State and any place outside thereof.

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation, directly essential to the production thereof, in any State.

#### STATEMENT

This action was brought by the Secretary of Labor under Section 17 of the Fair Labor Standards Act to enjoin respondents from violating the overtime and record-keeping requirements of the Act with respect to their non-professional employees—draftsmen, fieldmen, and stenographer-bookkeepers.<sup>1</sup>

<sup>1</sup> It is stipulated that, if the Act covers these employees, overtime and record-keeping violations exist (Stip. R. 11a; R. 94a-97a). This action is not concerned with "professional" employees who may meet the requirements for exemption under Section 13 (a) (1) of the Act, which provides:

1. Respondents are partners engaged in a consultant architectural-engineering business, with a principal office in Norfolk, Virginia, and a branch office in Washington, D. C., and with foreign associates in France and Italy.

Respondents' business relates essentially to industrial, as distinguished from residential, projects, and admittedly a substantial amount of their work is for out-of-state projects and out-of-state clientele, at least 50% of the work of the Washington office relating to out-of-state projects (R. 13a). As summarized in the opinion below, "[t]hey have worked and are now employed on numerous projects in Virginia, Maryland and the District of Columbia, and have worked on some projects in North Carolina and overseas" (R.143a-144a). "These activities require constant coordination and communication, as well as transmission of information and materials between the two offices" (R.144a). The plans and specifications are "frequently transmitted out of state" (R. 6a), both between respondents' offices for correlation, integration or review (R. 68a, 72a), and, as indicated in more detail, *infra*, pp. 7-10, to out-of-state clients with copies for out-of-state bidders, contractors and suppliers of materials (R. 144a).

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"(a) The provisions of sections 6 and 7 shall not apply with respect to (1) any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the Administrator); \* \* \*"

The exemption issue was not raised by respondents in the courts below and is not presented here, the only issue being whether employees who do not qualify as exempt "professional" employees as defined and delimited by the Secretary of Labor are within the general coverage of the Act. See 29 C. F. R. (1957 Supp.) Pt. 541.3; 14 F. R. 7705.

Respondents employ a total of 65 to 70 employees (including professional and non-professional), of whom about 30 are in the Norfolk office, about 20 in the Washington office, and about 15 to 20 overseas (R. 12a, 85a). With "a direct private telephone line between the Norfolk and Washington offices," "telephonic communications are numerous and the line is used for the purpose of controlling, supervising and coordinating the work of the Washington office from Norfolk" (R. 5a). Also, "payrolls for both offices, as well as for employees in foreign offices are made up in the Norfolk office and checks are mailed to Washington and foreign countries" (*ibid*). No set rule is maintained with respect to where a set of plans is prepared—"if we want to do part in Washington we do it; if we want to do part in Norfolk, we do it" (R. 68a). As both the trial court and the Court of Appeals found, respondents' non-professional draftsmen, fieldmen and clerical employees engage substantially in the extensive interstate communications or interstate travel incident to respondents' business and in the preparation of plans, drawings, specifications, etc., "many of which are transmitted across state lines," and many of which are prepared for interstate projects (R. 5a-6a; 144a-46a).

2. The great bulk of respondents' business consists of the preparation of plans, specifications and drawings for federal, state and municipal governmental projects. As stated in the opinion below, they "include, primarily, projects for the improvement, enlargement and repair of installations at military bases, airfields, shipyards and radio stations for the United States military services, and also a substantial number of state and municipal undertakings and projects." (R. 144a.)



About 60 percent of the work of the Virginia office is done pursuant to contracts with United States Army and Navy agencies, and about 85 percent of the work of the Washington office is for the Army and Navy or for state and municipal government agencies (R. 2a). "Projects for the improvement or repair of interstate instrumentalities on which the defendants have worked include airfields and airplane facilities for which streets are widened or constructed, hangars are repaired or altered, and extensions are built. Radio and television facilities are relocated, repairs to government buildings at shipyards and machine shops are made, and other work in Maryland, Virginia and North Carolina is constructed" (Op. below, R. 146a).<sup>2</sup>

3. The plans and specifications furnished by respondents for such projects contain detailed drawings, blueprints, surveys, estimates and other data together with specific detailed instructions to the builder on every aspect of the actual construction work. The industrial-type projects, and particularly the government projects, on which respondents have been primarily engaged "are intricate in design and construction and could not be constructed without the plans and specifications prepared by the [respondents'] employees" (Op. below, R. 144a; R. 48a-49a). These plans and specifications obviously include much more than a professional architect's designs and advice. As is illustrated by the voluminous sets of plans and specifications prepared by respondents for projects listed in

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<sup>2</sup> For details of the numerous projects for improvement, repair, or enlargement of interstate instrumentalities or facilities, on which respondents worked for the two year period ending April 1956, see the Appendix, *infra*, pp. 52-54.

Appendix A to the stipulation (R. 18a-29a),<sup>3</sup> most of the work is evidently more engineering than architectural in nature, and it involves the assembling and compilation of detailed estimates, measurements, field survey information, materials and equipment specifications, carpentry, electrical and other construction data, and similar routine work of a non-professional nature.

The plans and specifications include in minute detail all of the data, information, and instructions needed to guide the clients and their contractors, subcontractors and material suppliers, in bidding, financing, purchasing materials and equipment, as well as in carrying out the actual construction work (R. 100a). The specifications include not only the general conditions, which are to govern the construction work, but also specific data in regard to the kinds, types, sizes of materials to be used, and where and how they enter into the construction. For example, on projects requiring substantial brick work or concrete, the composition and precise proportions of the mixture of brick mortar and concrete, as well as the method of mixing, are specified in detail. It is common knowledge that plans and specifications for government construction projects, in particular, require such detailed data and instructions.

4. The plans and specifications prepared for various federal, state, and municipal government agencies (which have been the source of the bulk of respondents' business, Stip. R. 13a) are submitted to these agencies in their original form and become the property of the

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<sup>3</sup> Representative samples of such plans and specifications were attached to the stipulation as Appendix C (R. 12a, 33a) and an illustrative set of specifications was introduced as Plaintiff's Exh. 4 (R. 44a-45a). Because of their bulk, they were filed in original form and were not printed in the record.

agencies (Stip. R. 14a). Since such government agencies frequently require numerous copies of the specifications, respondents prepare and furnish "original, reproducible drawings and tracings (plans), and stencils for making multiple copies" (Stip. R. 13a). As stated in the findings of the trial court, the "government contracts admittedly require a great number of specifications which are reproduced by an independent blueprint company and are subsequently sent by the government agencies to prospective bidders, many of whom are without the State of Virginia and the District of Columbia" (R. 2a-3a; 145a).

A large portion of the governmental work (the full 60 percent at the Norfolk office) is done for the United States Army and Navy (R. 2a-3a). The plans, drawings, specifications, estimates, and advance-planning reports prepared by respondents' employees for these projects are furnished primarily to the Corps of Engineers, the Fifth Naval District, and the Potomac River Naval Command (R. 112a, 113a, 68a). Copies of all preliminary plans, specifications, and analyses of design furnished to the Norfolk District Corps of Engineers are transmitted to the Division Engineer, North Atlantic Division, New York, for review and approval; for large projects, marked-up drafts of final specifications are also transmitted to New York for review and approval; and in all cases, a set of the completed final plans and specifications as furnished to prospective bidders are transmitted to the North Atlantic Division in New York for record purposes (Govt's. Exh. No. 2, R. 113a-114a). Similarly, all advance-planning reports and copies of all plans and specifications furnished by respondents to the Fifth Naval District at Norfolk are



forwarded to the Bureau of Yards and Docks, Washington, D. C., for review and approval (Govt's. Exh. No. 1, R. 112a-113a).

Copies of the final plans and specifications are also sent to any out-of-state contractors who are interested in submitting bids (Govt's Exhs. 1, 2 and 3, R. 112a-115a). In connection with any proposed large project, it is the regular practice of the Corps of Engineers to send out advance notice to approximately 400 general contractors, major subcontractors and suppliers, and this notice "always results in requests for sets of plans and specifications from several out-of-state contracting firms," in response to which sets are sent to "several firms outside the State of Virginia to enable them to prepare and submit bids" (R. 115a). Since general contractors need more than one set, two or three sets of plans and specifications are sent upon request (*ibid.*). With respect to projects for the Army and Navy agencies, respondents have reason and knowledge to expect that copies of the plans and specifications furnished by them will be thus sent out-of-state to prospective bidders (R. 46a-47a).

There is, also, interstate transmission of plans, drawings and specifications for municipal governmental projects. The numerous surveys, drawings, plans, etc. for the approximately 50 individual projects for the Washington Suburban Sanitation Commission, located in Maryland (Jobs Nos. 893-893-3, 939-939-24; R. 23a, 26a-27a, 65a), were prepared in respondents' District of Columbia office and submitted to the Commission at its headquarters in Hyattsville, Maryland; in addition to the final plans, several drafts of preliminary plans and drawings relating to particular projects were thus

transmitted out-of-state to the Commission for approval, examination, and suggestions (R. 65a).<sup>4</sup>

5. The decision below that none of respondents' employees is engaged "in commerce or in the production of goods for commerce" within the coverage of the Act rested, basically, on the ground that the preparation of plans and specifications by an independent architectural-engineering consultant firm is an "essentially local" business and that any interstate activities are "merely incidental to the local enterprise" (R. 151a). Although recognizing that the plans and specifications "consist of physical material" and that "many \* \* \* are transmitted across state lines" (R. 144a), the Court of Appeals held that their preparation was not production of "goods" for "commerce" within the meaning of the statutory definitions because they are "only the written embodiment of professional advice \* \* \* specifically prepared to meet the particular problem of a specific client and are not sold or offered for

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<sup>4</sup> There is likewise considerable interstate transmission of plans and specifications for non-governmental projects to out-of-state bidders (R. 61a-62a), or to out-of-state representatives of important prospective tenants for approval (R. 58a-59a, 63a-64a). Where respondents' employees supervise the actual construction of the projects (for about 50 percent of their non-governmental clients; R. 15a), "shop drawings" on articles, materials, and equipment to be installed or used in the construction are submitted by subcontractors (through the contractor) to respondents, for checking and approval to make sure that the specifications are met. These drawings relate to such equipment and materials as doors, windows, floor material, bricks and prefabricated partitions. Some of the materials or equipment is submitted in the form of samples. After the drawing or samples have been checked and/or corrected they are returned to the contractor and then sent back to the manufacturer or supplier. According to an employee in the Norfolk office, one-half of the drawings examined and corrected by him were from manufacturers located outside the State of Virginia (R. 81a-83a).

sale to the public generally" (R. 147a). The admitted direct and substantial participation in interstate communications and transmission of information and materials, and interstate travel, by individual employees, and their work in preparing plans and specifications for specific interstate projects, were held to be outside the scope of the Act on the ground that "[a]ll of these activities related to the production of plans, partook of their intrastate character, and cannot be fairly characterized as commerce between states" (R. 151a).

#### SUMMARY OF ARGUMENT

The undisputed facts, as described in the opinions of both courts below, contradict any characterization of respondent's business as "essentially local" and establish beyond doubt that respondents' non-professional employees regularly and substantially work on plans, specifications and materials for transmission across state lines and for projects for the improvement of interstate facilities, as well as engage extensively in the interstate communications or interstate travel necessitated by the nature of respondents' multi-state organization and out-of-state clientele and operations. These facts amply suffice to bring respondents' employees within the terms of both phases of the Fair Labor Standards Act's coverage ("in commerce" and "in the production of goods for commerce") on any one of several separate grounds.

#### A

The employees' regular preparation of plans and specifications essential to the construction of projects for improvement of interstate instrumentalities and facilities brings them within the Act's "in commerce"



coverage. That employees engaged in the construction of projects for the improvement or repair of interstate instrumentalities (such as the airfields and airplane facilities, shipyards and radio and television facilities here involved) are engaged "in commerce" is now well established and was not questioned below (see *e.g.*, *Mitchell v. Vollmer & Co.*, 349 U.S. 427). The ruling below that such coverage does not include the preparation of plans, specifications and other materials specifically designed for such interstate projects is inconsistent with the principles of this Court's decisions (most recently reaffirmed in *Vollmer*, 349 U.S. 427), and conflicts with decisions of every other court of appeals which has ruled on the issue.

1. The Eighth Circuit in *Mitchell v. Brown Engineering Co.*, 224 F. 2d 359, certiorari denied, 350 U.S. 875, with whose reasoning and result the decision below is in direct conflict, correctly applied *Vollmer's* principles of "liberal construction" and "practical considerations," and its test of coverage, *i.e.*, whether the *employees' work* is so related to the interstate improvement project "as to be, in practical effect, a part of it, rather than isolated, local activity" (349 U.S. at 429). Viewing the preparation of plans and specifications "in a practical aspect in relation to the whole construction project" for which the plans and specifications are specifically designed, the Eighth Circuit concluded that such work is no more "isolated local activity" than "actual manual labor on the projects under repair and improvement" (224 F. 2d at 364-365). The Fourth Circuit's contrary view, which would exclude such work because *the employer* is an independent enterprise or because the work is not performed "at the site of construction," ignores "practical con-

siderations" such as the vital and intimate relation of plans and specifications to such interstate improvement projects (*Vollmer*, 349 U.S. at 429). It is also inconsistent (a) with the well-settled principle that coverage is "determined on the basis of the employee's activity and not by the nature of the employer's business" (*Brown Engineering, supra*, at 365; *Overstreet v. North Shore Corp.*, 318 U.S. 125, 132), as well as (b) with this Court's decisions rejecting the distinction between "on-the-road" and "off-the-road" workers (*Alstate Construction Co. v. Durkin*, 345 U.S. 13, 16; *Thomas v. Hempt Bros.*, 345 U.S. 19; see also *Tobin v. Pennington-Winter Construction Co.*, 198 F. 2d 334 (C.A. 10), certiorari denied, 345 U.S. 915).

Even prior to *Vollmer*, the Second and Ninth Courts of Appeals (in *Laudadio v. White Construction Co.*, 163 F. 2d 383 (C.A. 2) and *Ritch v. Puget Sound Bridge and Dredging Co.*, 156 F. 2d 334 (C.A. 9)) upheld the coverage of "off-the-site" draftsmen and clerical workers preparing plans and drawings for projects of the same kind that comprise a primary part of the business of respondents' firm here, on the ground that no distinction could rationally be drawn between the so-called "white collar" workers (the "draftsmen engaged in designing and laying out the work to be done by others") and the workers engaged in the actual dredging and construction operations which were performed "all pursuant to the draftsmen's plans" (156 F. 2d at 337, emphasis added).

2. The decision below mistakenly relied mainly, if not solely, upon *10 East 40th Street v. Callus*, 325 U.S. 578. In marked contrast to the instant case, neither the employer nor the employees in *Callus* engaged di-

rectly in any interstate activities and none of the employees' work (general building maintenance service) was specifically designed for particular interstate projects, the claim of coverage resting solely upon "thin" evidence of a general relationship to interstate manufacturing carried on by *some* of the building tenants elsewhere. *Callus* thus lends no support to the conclusion that individual employees engaged substantially and directly in interstate activities are excluded from the Act's coverage, even if the employer's business were shown to be an "essentially local" enterprise. As pointed out above, the rule is to the contrary—this Court has "repeatedly said, the application of the Act depends upon the character of the employees' activities" (*Overstreet*, 318 U.S. at 132). The interstate aspects of respondents' business here, and the individual employees' regular participation in such interstate activities, are unquestionably substantial enough to require application of this principle, and to preclude the sweeping general exemption from the Act that the decision below would provide.

Nor is *Callus* authority for excluding from the Act's coverage the interstate activities of respondents' employees simply because they are employed by an "independent enterprise" performing work "for a general miscellany of clients". This is evident from the numerous decisions holding the Act applicable to employees of independent enterprises dealing with a miscellany of customers where a regular and substantial proportion of the customers were interstate producers or interstate instrumentalities (*Roland Electric Co. v. Walling*, 326 U.S. 657; *Thomas v. Hempt Bros.*, 345 U.S. 19; and *Schulte Co. v. Gangi*, 328 U.S. 108). Also, it is well-settled that the Act applies to a wide



variety of businesses serving locally a general miscel-lany of customers including electric and gas companies, water companies, ice companies, coal distributing companies and telephone companies. The application of the Act to such businesses was expressly approved by Congress at the time of the enactment of the 1949 Amendments as was the coverage ruling of *Roland Electric, supra*, the Congressional reports specifically stating that employees of such companies "will remain subject to the Act, *notwithstanding they are employed by an independent employer \* \* \**" (House Report, 95 Cong. Rec. 14929, emphasis added; Senate Report, 95 Cong. Rec. 14874-75).

## B

The interstate communications and transmission of documents and materials and the interstate travel, in which respondents' employees regularly and substantially engage, is clearly engagement "in commerce" within the Act's coverage. These interstate activities, which are admittedly necessitated by the nature of respondents' multi-state organization, are not only "transportation, transmission or communication" within the literal terms of the statutory definition, but are undeniably "so directly and vitally related to the functioning of" and so "integral a part of" respondents' extensive interstate operations as a whole, as to be a part of those interstate operations, "rather than isolated local activity," under any "liberal" or "practical" view of the case. Even in the absence of express statutory inclusion of interstate "communication," this Court has repeatedly held that the interstate use of the mails to transmit communications of the same or similar type here involved constitutes interstate com-

merce, and the Court's decisions are equally clear that interstate travel or movement of persons across state lines, even for non-commercial purposes, is interstate commerce.

There is nothing in the policy and purposes of the Fair Labor Standards Act which would warrant straining to restrict its "in commerce" coverage more narrowly than the same or comparable statutory language in other federal regulatory acts. On the contrary, such a restrictive construction is inconsistent with this Court's ruling that "the purpose of the Act was to extend federal control in this field throughout the farthest reaches of the channels of interstate commerce" (*Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 567) and that "the policy of Congressional abnegation with respect to occupations affecting commerce is no reason for narrowly circumscribing the phrase 'engaged in commerce'" (*Overstreet v. North Shore Corp.*, 318 U.S. 125, 128). It is also inconsistent with the principles that this Act's coverage provisions must be given a "liberal" construction (*Vollmer*, 349 U.S. at 429) and accorded the "breadth of coverage" consistent with its "terms of substantial universality" (*Powell v. United States Cartridge Co.*, 339 U.S. 497, 516). These principles clearly support the recent decisions of the Eighth and First Circuits upholding the coverage of interstate travel and interstate communications in circumstances comparable to the instant case. *Mitchell v. Kroger Co.*, 248 F. 2d 935 (C.A. 8) and *Aetna Finance Co. v. Mitchell*, 247 F. 2d 190 (C.A. 1).

### C

The non-professional physical preparation of plans, specifications, and drawings for transmission across

state lines, or for use in the construction of repairs or improvements to interstate instrumentalities and facilities, also constitutes "production of goods for commerce." As both courts below apparently conceded, if the plans, specifications, etc. are "goods" within the meaning of the statutory definition of Section 3(i), the employees preparing them are "producing" ("handling, transporting, or in any other manner working on") them for "commerce" ("transmission \* \* \* between any State and any place outside thereof") within the terms of Sections 3(j) and (b) of the Act.

1. The view that plans and specifications are not "articles or subjects of commerce" simply because they represent the "embodiment of ideas" (R. 148a) is difficult to reconcile with the ruling in *Western Union Telegraph Co. v. Lenroot*, 323 U.S. 490, that "telegraphic messages are clearly 'subjects of commerce' and hence that they are 'goods' under this Act," or with the "unmistakable evidence [in the legislative history] of a purpose to extend the definition \* \* \* to everything which had been considered a 'subject of commerce'; that is, to whatever Congress could regulate as such a subject" (see 141 F. 2d 400 at 403). The physical embodiment of mental ideas into tangible and bulky plans and specifications obviously involves considerable routine, clerical and other physical labor by workers of the type with whom this Act was concerned, and the products of this labor are tangible materials which can be and are "subjects of commerce" (i.e., interstate "transportation" or "transmission") within the literal terms of the statutory definitions.

2. The position that such work is outside the Act because *incidental* to professional planning and advice



is contradicted by *Borden Co. v. Borella*, 325 U.S. 679, where maintenance employees of Borden's central office building for its executive officers and administrative employees were held within the Act's coverage, on the ground that the "economic production" with which this Act is concerned includes "not simply the manual, physical labor involved in changing the form or utility of a tangible article" but also "planning and control" and the work of one "who conceives or directs a productive activity" (325 U. S. at 683). The Act's "professional" exemption (Section 19(a)(1))—not involved in the present case—must be sharply distinguished from its coverage provisions, 325 U.S. at 684.

3. The view that plans and specifications are not "goods for commerce" because they lack the characteristics of ordinary articles sold commercially to the public generally (R. 148a-149a) is contrary to the basic rationale of *Powell v. United States Cartridge Co.*, 339 U.S. 497, which explicitly repudiated the contention that coverage is limited to "commercial" transactions or to "articles that are intended for sale, exchange or other trading activities" (339 U.S. at 512), while emphasizing the "terms of substantial universality" in which the broad statutory purposes and the statutory coverage definitions are stated (*id.* at 509-516).

4. The plans and specifications prepared specifically for use in the repair or improvement of interstate instrumentalities or facilities are also produced "for commerce" under the principles of this Court's decisions in *Alstate Construction Co. v. Durkin*, 345 U.S. 13, and *Thomas v. Hempt Bros.*, 345 U. S. 19. While the road materials there involved may be physically incorporated into the road, the plans and specifications guide and determine the execution of the

improvement in every detail (including the instructions and specifications for the supplies and materials to be physically incorporated in the interstate structures) from the beginning to the end of the construction work. Even if such plans and specifications were not themselves "goods," their preparation is a "closely related process or occupation directly essential" to the production of the supplies and materials (indisputably "goods") for such commerce, no less than the preparation of "tools, dies, designs, patterns \* \* \* or other equipment" used by the purchaser "in the production of other goods for interstate commerce," or the furnishing of gas, electricity, fuel or water for use in the production of goods for commerce, which have been expressly recognized by Congress as "closely related and directly essential to the production of goods for commerce" within the terms of Section 3(j), as amended in 1949. See House Conferees' Report of the 1949 Amendments, 95 Cong. Rec. 14874; and Report of the Majority of Senate Conferees, 95 Cong. Rec. 14928.

#### ARGUMENT

#### **Respondents' Non-Professional Employees (Draftsmen, Fieldmen and Clerical Employees) Are Engaged Both "in Commerce" and "in the Production of Goods for Commerce" Within the Meaning of the Fair Labor Standards Act**

The undisputed facts regarding the activities of respondents' non-professional employees, as described in the opinions of both courts below, undeniably fall within the literal terms of both phases of the coverage of the Fair Labor Standards Act. Not only is respondents' business admittedly organized to operate in two states (and overseas) so as to "require constant coordination and communication, as well as transmission of informa-

tion and materials between the two offices" (R. 144a), but both offices admittedly deal substantially with out-of-state and overseas clients and with out-of-state bidders, contractors and suppliers, and perform work for out-of-state projects, and primarily for the improvement, enlargement and repair of interstate instrumentalities or facilities (see the Statement, *supra*, pp. 4-10).

Factually, therefore, respondents' business is unquestionably of an interstate character in almost every aspect, and the regular activities of the individual *employees* concededly include frequent and numerous interstate communications and transmission of information and materials by "all stenographic personnel," frequent interstate travel together with interstate transmission of data by fieldmen, and preparation of drawings, specifications, plans and estimates ("many of which are transmitted across state lines") by draftsmen (R. 5a-6a, 144a), as well as substantial work by all on plans and specifications essential to projects for the repair or improvement of interstate instrumentalities (see the Statement, *supra*, pp. 5-6).

These conceded facts, we believe, contradict the characterization of respondents' business as "essentially local," and amply suffice to meet the statutory standards for coverage on any one of several separate grounds.

***A. The Employees' Regular Preparation of Plans and Specifications Essential to the Construction of Projects for Improvement of Interstate Instrumentalities and Facilities Brings Them Within the Act's "In Commerce" Coverage.***

As found by the court below, the great bulk of respondents' business consists of preparation of plans;



specifications and drawings for governmental projects, which "include, primarily, projects for the improvement, enlargement and repair of installations at military bases, airfields, shipyards and radio stations for the United States military services, and also a substantial number of state and municipal undertakings and projects" (R. 144a). The court further found: "Projects for the improvement or repair of interstate instrumentalities on which the defendants have worked include airfields and airplane facilities for which streets are widened or constructed, hangers are repaired or altered, and extensions are built," relocation of "[r]adio and television facilities \* \* \*, repairs to government buildings at shipyards \* \* \*" (R. 146a).

That construction of such projects is "in commerce" within the meaning of the Act was not questioned by the Court of Appeals and is now well-settled.<sup>5</sup> The

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<sup>5</sup> *Mitchell v. C. W. Vollmer & Co.*, 349 U.S. 427 (construction of new lock and dam for the improvement of the Gulf Intercoastal Waterway); *Tobin v. Pennington-Winter Construction Company*, 198 F.2d 334 (C.A. 10), certiorari denied, 345 U.S. 915 (construction of a multi-purpose dam for improvement of the Arkansas and Mississippi Rivers); *Walling v. Patton-Tulley Transportation Co.*, 134 F.2d 945 (C.A. 6) (construction of new dikes and revetments on the Mississippi River); *Ritch v. Puget Sound Bridge and Dredging Co.*, 156 F.2d 334 (C.A. 9) (dredging of a new channel and construction of a new pier with retaining walls at Bremerton Harbor); *Tobin v. Ramey*, 205 F.2d 606 (C.A. 5), rehearing denied, 206 F.2d 505, certiorari denied *sub nom. Hughes Const. Co. v. Secretary of Labor*, 346 U.S. 925 (enlargement of a set-back levee, which, though a segment of the Mississippi levee system, was three to six miles from the river's banks); *Bennett v. V. P. Loftis Co.*, 167 F.2d 286 (C.A. 4) (construction of a new bridge for highway improvement); *Mitchell v. Empire Gas Engineering Co.*, 13 WH Cases 721 (not officially reported) (C.A. 5) (construction of jet-fueling system on air base); *Archer v. Brown & Root, Inc.*, 241 F.2d 663 (C.A. 5) (construction of a new 25-mile causeway and bridge to connect with interstate highway); *Mitchell v. Raines*, 238 F.2d

issue is whether the preparation of plans and specifications for the projects is not also "in commerce."

1. The ruling that the employees' work on the plans and specifications prepared specifically for the projects is "essentially local," rather than a part of these interstate repair or improvement projects, conflicts directly with the decision of the Eighth Circuit in *Mitchell v. Brown Engineering Co.*, 224 F. 2d 359, certiorari denied, 350 U.S. 875, and is also inconsistent with every other circuit which has had occasion to rule on similar issues (*Laudadio v. White Construction Co.*, 163 F. 2d 383 (C.A. 2); *Ritch v. Puget Sound Bridge and Dredging Co.*, 156 F. 2d 334 (C.A. 9); see also *Tobin v. Pennington-Winter Const. Co.*, 198 F. 2d 334 (C.A. 10), certiorari denied, 345 U.S. 915, and *Archer v. Brown & Root, Inc.*, 241 F. 2d 663 (C.A. 5), certiorari denied, 355 U.S. 825). We submit that the plain statutory terms, as well as the decisions of this Court construing the Act's coverage, support these other rulings rather than the holding of the court below. *Mitchell v. C. W. Vollmer & Co.*, 349 U.S. 427; *Overstreet v. North Shore Corp.*, 318 U.S. 125; *Fitzgerald Co. v. Pedersen*,

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186 (C.A. 5), (improvements to Georgia State Highway system); *Mitchell v. Brown Engineering Co.*, 224 F.2d 359 (C.A. 8), certiorari denied, 350 U.S. 875 (highway improvement projects); *Mitchell v. Hodges Contracting Co.*, 238 F.2d 380 (C.A. 5) (radio-TV improvement and replacement); *Walling v. McCrady Construction Co.*, 156 F.2d 932 (C.A. 3), certiorari denied, 329 U.S. 785 (road improvement projects); *Laudadio v. White Construction Co.*, 163 F.2d 383 (C.A. 2) (construction of extensions to airport runways and additions to hangars). See also *Alstate Construction Co. v. Durkin*, 345 U.S. 13 (production of road materials for use in highway improvement projects); *Tobin v. Johnson*, 198 F.2d 130 (C.A. 8), certiorari denied, 345 U.S. 915 (same as *Alstate*); *Schmitt v. War Emergency Pipelines*, 175 F.2d 335 (C.A. 8), certiorari denied, 338 U.S. 869 (construction of extensions to oil pipelines).

324 U.S. 720; *Alstate Const. Co. v. Durkin*, 345 U.S. 13; *Thomas v. Hempt Bros.*, 345 U.S. 19.

The work of preparing surveys, plans, specifications, and designs for use in the repair or improvement of existing interstate instrumentalities and facilities is as much a part of "the work of improving existing facilities of interstate commerce" and "of the redesigning of an existing facility of interstate commerce" (see 349 U.S. at 430), as was the "building of guide levees"—an initial step in the construction of the lock and canal improvement to an existing interstate waterway—held covered in *Vollmer, supra*. These necessary preliminary tasks are nonetheless "essentially a part of the larger one" of accomplishing the repair or improvement of the interstate facility (see *Pedersen v. Delaware, L. & W.R.R. Co.*, 229 U.S. 146, 152). The surveys and specifications are indeed the immediate foundation upon which all of the succeeding (admittedly covered) construction work depends. It is clearly not "isolated, local activity" but is rather "in practical effect, a part of" the improvement of the interstate facility (*Vollmer*, 349 U. S. at 429).

Applying the principles of this Court's *Vollmer* decision, the Eighth Circuit in *Brown Engineering, supra*, which involved precisely the same type of employees of a firm engaged in precisely the same kind of consultant, architectural-engineering business, found no difficulty in holding the non-professional employees to be engaged "in commerce" by reason of their participation in the preparation of plans and specifications for the repair and improvement of roads, highways and power plant facilities. Even though the *Brown Engineering* firm limited its operations to such projects within the same state and had no out-of-state branch offices or asso-



ciates, the Eighth Circuit rejected the contention (strenuously urged there with much more reason than the facts of the instant case would justify) that consultant architectural-engineering work is an "essentially local" business and that the preparation of plans and specifications was too remote from the repair and improvement of the interstate instrumentalities to be within the scope of the Act's coverage.\*

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\* Not only is the characterization of "essentially local" contradicted by the facts in the record of the instant case, but it is contrary to the well-recognized fact that the business of most consultant architectural-engineering firms in the modern industrial pattern is *not* limited to one State and depends substantially upon interstate operations. As pointed out in the Government's petition for a writ of certiorari in the present case (pp. 25-28), a recent comprehensive survey of the private practice of engineering in the United States by the publication *Consulting Engineer* (January and February 1957 issues) reports that most of the firms in this field do *not* limit their operations to any one state; 72 percent of the consulting firms being active in more than one state, and 28 percent having expanded their geographical range to foreign projects. The survey emphasizes that "consulting engineers are greatly expanding their geographical range," the situation being "quite different" today from "the scope of operations of firms when first organized," at which time 53% of the firms (in contrast to only 28% today) limited themselves to operation within one state, and adds that "This geographical expansion will continue" (February issue, p. 79).

In addition to this expansion into direct interstate operation, the survey shows that industrial work (particularly for federal, state, and municipal governments) constitutes a major part of the business in this field and is constantly increasing (February issue, p. 81, Table 4, p. 82). Some indication of the substantiality of this type of work is evidenced by the expenditures of the Army and Navy for architectural and engineering contract work during the year 1957, which totaled over \$113,000,000 (on almost 2,000 contracts for \$10,000 or more each). Another major source of the business of such firms is highway construction. According to the Annual Report of the Bureau of Public Roads for Fiscal Year 1955, the state highway departments had committed 3.5 million dollars for fees to private engineering firms in connection with their federally-

In contrast with the Fourth Circuit's narrow and mistaken view of the nature of this type of work, the Eighth Circuit correctly viewed the preparation of plans and specifications "in a practical aspect in relation to the whole construction project" for which the plans and specifications were specifically designed, and concluded that such work is no more "isolated local activity" than "actual manual labor on the projects under repair and improvement" (224 F. 2d at 364, 365). The fact that the employer was engaged in an "independent enterprise," which the Fourth Circuit evidently regarded as of major significance, was correctly described by the Eighth Circuit as "of minor significance," in view of the settled principle that coverage is "determined on the basis of the employee's activity and not by the nature of the employer's business" (citing this Court's decision in *Overstreet v. North Shore Corp.*, 318 U.S. 125, 132 (224 F. 2d at 365)); see also *Kirschbaum Co. v. Walling*, 316 U.S. 517, 524; *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 571-572.<sup>1</sup>

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aided road projects alone (Annual Report, p. 7). This type of business will, of course, be considerably increased under the gigantic road construction program initiated by the 24 billion dollar Federal-Aid Highway Act of 1956 (Public Law 627—84th Cong., 2d Sess., 70 Stat. 374). The Department of Commerce has estimated that the cost of preliminary engineering (surveys, detail plans, specifications and contract documents) required for this program will exceed 1¼ billion dollars (House Document No. 300, 85th Cong., 2d Sess., p. 4, Table C, p. 6).

<sup>1</sup>As this Court has "repeatedly said, the application of the Act depends upon the character of the employees' activities" (*Overstreet*, 318 U.S. at 132), and therefore "the fact that all of respondent's business is not shown to have an interstate character is not important" (*Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 571-572). Thus, although the "bulk of the merchandise" handled in the ware-

Although the Fourth Circuit stated this principle (R. 152a), it proceeded to follow the opposite course, not only taking "the occupation of the employer \* \* \* into consideration" but manifestly making it the controlling factor. For the opinion below itself concedes that "[u]ndoubtedly the term 'in commerce' covers not only the activity of workers who share directly in the work of construction but also those who do the paper work such as the preparation of lists of material or pay-rolls, or who serve as fieldmen and timekeepers on the job." It also recognizes that other Courts of Appeals (the Second and Ninth in *Laudadio v. White Construction Co.*, 163 F. 2d 383, and *Ritch v. Puget Sound Bridge and Dredging Co.*, 156 F. 2d 334) have held the "preparation of plans or drawings \* \* \* by employees of the [construction] contractor" were engaged in commerce (R. 151a).<sup>2</sup>

In the *Laudadio* and *Ritch* cases, the Courts of Appeals held that the Act covered draftsmen and clerical

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houses in *Jacksonville Paper* was for "local disposition" (317 U.S. at 566, 570), the Court specifically ruled that (at 571):

The use of the words "in commerce" entails an analysis of the various types of transactions and the particular course of business \* \* \*. The fact that all of respondent's business is not shown to have an interstate character is not important. The applicability of the Act is dependent on the character of the employees' work. \* \* \*

This principle applies even "where the employer is not himself engaged in an industry partaking of interstate commerce," and "in any event, to the extent that his employees are 'engaged in commerce or in the production of goods for commerce,' the employer is himself so engaged" within the meaning of this Act (*Kirschbaum Co. v. Walling*, 316 U.S. at 524).

<sup>2</sup> These decisions were distinguished by the court below solely on the ground that they furnished "no clean-cut holding that the work of employees of independent architects, such as are before us in this case, is 'commerce' under the Act."



workers preparing the plans and drawings for, as well as the workers engaged in the actual construction of, projects for the improvement and expansion of interstate instrumentalities. The project in the *Laudadio* case was extension of runways at a naval air base, and the project in *Ritch* was dredging channels for the improvement of the harbor at the Bremerton Navy Yard, i.e., both projects of the same kind that comprise a primary part of the business of the respondents. In opposition to the Fourth Circuit's view that the Act's coverage is limited to employees participating "actively at the site of construction" (R. 153a), the Ninth Circuit in *Ritch* ruled that no such distinction could rationally be drawn between the so-called "white collar" workers (the "draftsmen engaged in designing and laying out the work to be done by others") and the workers engaged in the actual dredging and construction operations which were performed "all pursuant to the draftsmen's plans."<sup>9</sup> This ruling, rather than that of the Fourth Circuit, clearly accords with this Court's decisions. The Fourth Circuit's restriction of coverage to workers "at the site of construction" cor-

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<sup>9</sup> The restricted view expressed in the ruling below is also contrary to the Fourth Circuit's own earlier decision in *Bennett v. V. P. Loftis Co.*, 167 F.2d 286. In that case, the court held the night-watchman guarding a road bridge under construction to be engaged "in commerce" within the coverage of the Act, "although [the watchman] took no part in the actual construction of the bridge in the sense of driving nails, or pouring concrete, or the like," on the ground that (167 F.2d at 288):

If the declared purpose of the Act is to be accomplished, a project should be considered as a whole, in a realistic way; not broken down into its various phases so as to defeat the purpose of the Act. This latter unrealistic approach was condemned by the Supreme Court in *Walling v. Jacksonville Paper Co.*, 317 U.S. 564. [Emphasis added.]

responds to, and is no more tenable than, the distinction between "on-the-road" and "off-the-road" workers which this Court rejected in *Alstate Construction Co. v. Durkin*, 345 U.S. 13, 16, and *Thomas v. Hempt Bros.*, 345 U.S. 19 (discussed *infra*, pp. 30-31, 47-49).

While these decisions were predicated on the "production of goods for commerce" phase of coverage, a comparable distinction has similarly been rejected in cases predicated on the "in commerce" phase of the Act's coverage. *Tobin v. Pennington-Winter Const. Co.*, 198 F. 2d 334 (C.A. 10), certiorari denied, 345 U.S. 915 (holding preliminary "off-the-river" work of clearing a reservoir site for construction of a dam designed as part of a broad comprehensive plan for the improvement of a navigable river to be "in commerce");<sup>10</sup> *Tobin v. Ramey*, 205 F. 2d 606 (C.A. 5), certiorari denied, 346 U.S. 925 (holding "off-the-river" construction of a set-back levee to be "in commerce"); *Archer v. Brown & Root, Inc.*, 241 F. 2d 663 (C.A. 5), certiorari denied, 355 U.S. 825 (where the construction of a plant to be used for prefabricating bridge slabs and materials needed in the construction of a causeway connecting interstate highways, was held to be "in commerce" as "part of the main job even though preliminary to it and unseen or nonexistent in the final product." *Id.* at 669). The preparation of preliminary plans and

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<sup>10</sup> This work was held covered despite the fact that the work was not in the river and was preliminary or preparatory to the main construction work, and was performed by an independent contractor, and despite the further fact that its beneficial effect upon navigability depended upon the future construction not only of the particular dam to be served by the reservoir but of a number of other similar tributary projects to be constructed over a period of years. The petition for certiorari in *Pennington-Winter*, which had been pending for over five months, was denied on the next decision day immediately after the *Alstate* decision.

specifications is no less an integral and essential part of the interstate project for which they specifically are designed, than the preliminary reservoir clearance in *Pennington-Winter*, or the construction of the pre-fabricating plant in *Archer*.

2. The court below mistakenly relied on *10 East 40th Street Co. v. Callus*, 325 U.S. 578, as authority for excluding respondents' employees from the coverage of the Act because respondents "may be likened to the owners of the general office building in the *Callus* case" in that they work for "a general miscellany of clients" (R. 153a). In no respect material to the Act's coverage can either respondents' enterprise or the employees' activities in this case be likened to *Callus*. In marked contrast, *neither the employer nor the employees* in *Callus* engaged directly in any interstate activities, none of the employees' work (general building maintenance service) was specifically designed for particular interstate projects, and the claim of coverage rested solely upon "thin" evidence of a general relationship to interstate manufacturing carried on by *some* of the building tenants elsewhere. Even on the "thin" evidence there presented, *Callus* found the question of coverage to be a very close one. Plainly, no such close borderline question is presented with respect to respondents' employees who are admittedly engaged directly, regularly, and substantially in interstate activities, including preparation of plans and specifications designed specifically for designated interstate projects, as well as "transportation, transmission, or communication" within the literal terms of the statutory definition (see *infra*, pp. 34-41).

That the Fourth Circuit has misapprehended the *Callus* decision in extending it to the admittedly inter-



state activities of respondents' employees is evident from the numerous decisions of this Court holding the Act applicable to employees of independent enterprises dealing with a miscellany of customers. Thus, in *Roland Electric Co. v. Walling*, 326 U.S. 657, the Court upheld coverage of employees of an independent electrical contracting company serving a general miscellany of customers, on the basis of evidence that the employees regularly performed work for 33 customers (out of a total of approximately 1,000) who were engaged in commerce or in production of goods for commerce. Similarly in *Thomas v. Hempt Bros.*, 345 U.S. 19, the Act was held applicable to employees of an independent enterprise operating a stone quarry and preparing cement mixtures and other materials for a miscellany of customers, among whom were "the Pennsylvania Turnpike, the Pennsylvania Railroad Company, an airport, an army depot, and a navy depot, \* \* \*" and "[o]ther purchasers [who] used their concrete on 'projects which aided the flow of commerce' \* \* \*" (345 U.S. at 20). The Court drew no distinction between this independent materialman, who dealt with the general miscellany of customers, and the Alstate Construction Company which prepared materials primarily for use in its own road construction work (*Alstate Construction Co. v. Durkin*, 345 U.S. 13, 15). Nor did it differentiate the independent materialman in *Tobin v. Johnson* (198 F.2d 130 (C.A. 8), certiorari denied, 345 U.S. 915)<sup>11</sup> who supplied a general mass of customers, coverage there having been sustained on

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<sup>11</sup> This case was cited in *Alstate* as one involving "similar facts" (345 U.S. at 15), and certiorari was denied March 16, 1953, the next decision day immediately after the *Alstate* decision.

the ground that a substantial proportion (about 50%) of the materials were furnished to various customers for use in road construction or in maintenance and repair of dikes and revetments on a navigable river. See also *Schulte Co. v. Gangi*, 328 U.S. 108, 118, sustaining coverage even of *building maintenance* employees in an independently operated building tenanted by a general miscellany of occupants, where the evidence showed that a sufficiently substantial proportion of the occupants were regularly engaged in producing various kinds of goods for shipment in interstate commerce.

The Fourth Circuit's mistaken view of the "local activity" which "the Act does not attempt to regulate" (R. 152a) also appears from the well-settled application of the Act to a wide variety of businesses serving locally a variety of customers, including electric and gas companies, water companies, ice companies, coal distributing companies and telephone companies.<sup>12</sup> In

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<sup>12</sup> *Lewis v. Florida Power & Light Co.*, 154 F.2d 751 (C.A. 5) (some of the electricity furnished for use in operating railroad signal lights and airport beacons); *Meeker Cooperative Light & Power Ass'n v. Phillips*, 158 F.2d 698 (C.A. 8); *New Mexico Public Service Co. v. Engel*, 145 F.2d 636 (C.A. 10) (supplying power, *inter alia*, to the Civil Aeronautics Authority for operating airline beacons and to miscellaneous other interstate instrumentalities and producers); *Davila v. Porto Rico Ry. Light & Power Co.*, 143 F.2d 236 (C.A. 1) (supplying power, *inter alia*, to a number of interstate producers); *Mitchell v. Mercer Water Co.*, 208 F.2d 900 (C.A. 3) (supplying substantial quantities of water and gas, *inter alia*, to interstate producers); *Atlantic Co. v. Walling*, 131 F.2d 518 (C.A. 5); *Chapman v. Home Ice Co. of Memphis*, 136 F.2d 353 (C.A. 6), certiorari denied, 320 U.S. 761 (ice companies among whose customers were fruit growers or railroads using the ice for refrigerator freight cars); *West Kentucky Coal Co. v. Walling*, 153 F.2d 582 (C.A. 6) (supplying substantial quantities of coal, *inter alia*, to some 15 or 18 interstate producers); *Schmidt v. Peoples Telephone Union of Maryville*, 138 F.2d 13 (C.A. 8) (telephone company serving

all these cases, coverage has been sustained by reason of the fact that among the general miscellany of customers were some interstate instrumentalities and interstate producers who were regular and substantial customers.

The application of the Act to such businesses was expressly approved by Congress at the time of the enactment of the 1949 Amendments,<sup>13</sup> as was the coverage ruling of *Roland Electric*, *supra*, p. 30. See Statement of the Majority of the Senate Conferees (95 Cong. Rec. 14874-75), which states that the work of such employees is covered by the Act "*whether they are employed by the producer of goods or by someone else who has undertaken the performance of particular tasks for the producer*" (*ibid.*, emphasis added). Similarly, the House Managers' report stated that the 1949 Amendments "are not intended to remove from the Act maintenance, custodial, and clerical employees" of the type held covered in *Kirschbaum* and in the public utility decisions, also expressly stating that such employees "will remain subject to the Act, *notwithstanding they are employed by an independent employer*

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local customers generally whose calls were primarily local but included a few regularly recurring interstate calls). Lower court decisions to the same effect are too numerous to cite.

<sup>13</sup> The House Report on the amendments specifically stated that "employees of public utilities, furnishing gas, electricity or water to firms within the State engaged in manufacturing, producing, or mining goods for commerce, will remain subject to the act." [Statement of the Managers on the Part of the House, 95 Cong. Rec. 14929.] Similarly, the Senate Report listed among the employees remaining within the coverage of the Act those engaged in "producing and supplying fuel, power, water \* \* \*", citing with approval *Meeker Coop. v. Phillips*, *Lewis v. Florida Power & Light Co.*, and *West Kentucky Coal Co. v. Walling*, *supra*, fn. 12 [95 Cong. Rec. 14875].



\* \* \* (95 Cong. Rec. 14929, emphasis added). While these statements were made with reference to the "production for commerce" phase of coverage (which was the coverage provision modified by the 1949 Amendments), the statements were obviously premised on a principle equally applicable to determining coverage of the "in commerce" phase (see *Jacksonville and Overstreet, supra*), i.e., that the determining factor is the relationship of the *employee's work* to the interstate commerce regardless of the independent character of the *employer's enterprise*.

The nub of it is that the Fourth Circuit's criticism of the Eighth Circuit's *Brown Engineering* decision, *supra*, p. 22, for "seem[ing] to ignore" the "local" nature of *the employer's business*—which, according to the decision below, "gave color" to the *employees' admittedly interstate activities* (R. 153a)—reveals that the Fourth Circuit has missed the point that it is the functional relationship of the employees' particular work or activities to interstate commerce, rather than the general nature of the employers' business, that is decisive of coverage. "The test is," this Court has said, "whether *the work* is so directly and vitally related to the functioning of an instrumentality or facility of interstate commerce as to be, in practical effect, a part of it, rather than, isolated, local activity," *Michell v. C.W. Vollmer & Co.*, 349 U.S. 427, 429 (emphasis added), and this must be "determined by practical considerations, not by technical conceptions" (*ibid.*). A determination ignores "practical considerations," and relies on "technical conceptions," when it is based not on what the employees are doing and not on what their work has to do with the instrumentalities of commerce, but on whether the employer is a construc-

tion company or an architectural-engineering firm, and on whether the employer undertakes other kinds of contracts as well. The practical effect on the improvement of an airfield or a shipyard is not measured by the "independence" of the employer or the character of his other clients. It depends on the role played by the work of the employees in the particular improvement projects. To transpose the language of the court below, "It is this element which the [court below and respondents] seem to ignore" (R. 153a)

***B. The Interstate Communications and Transmission of Documents and Materials and the Interstate Travel, in which Respondents' Employees Regularly and Substantially Engage, is Engagement "In Commerce" Within the Act's Coverage.***

The clear-cut findings, in which both courts below concurred, are that respondents' two-state offices are closely coordinated and in continuous communication, and that "all stenographic personnel employed in both offices" are "freely conceded" to be employed in the extensive interstate communication by telephone and correspondence, both between respondents' two offices and between these offices and out-of-state clients and contractors, and that the draftsmen work on plans, specifications, estimates, etc. "many of which are transmitted across state lines," and that the fieldmen "frequently travel across state lines" to gather data for the plans, specifications and estimates "which, in turn, are frequently transmitted out-of-state" (R. 5a-6a, 144a-146a). In view of these findings, the conclusion that none of these employees is engaged "in commerce" seems inexplicable. Here again it is evident that the

court was misled by its reliance on the factually and legally unsubstantiated assumption that respondents' business is "essentially local."

The employees' direct interstate communications by mail and telephone and interstate travel, which are admittedly a regular and substantial part of their duties required by the nature of respondents' geographic organization and multi-state operations, are not only "transportation, transmission or communication" within the literal terms of the statutory definition, but are undeniably "so directly and vitally related to the functioning of" and so "integral a part of" respondents' extensive interstate operations as a whole, as to be a part of those interstate operations, "rather than isolated, local activity," under any "liberal," "practical" or "realistic" view of the case. See *Mitchell v. Vollmer & Co.*, 349 U.S. 427, at 429; *Mitchell v. Kroger Co.*, 248 F.2d 935 (C.A. 8); and *Aetna Finance Co. v. Mitchell*, 247 F.2d 190 (C.A. 1).

Even in the absence of express statutory inclusion of interstate "communication," this Court has repeatedly held that the interstate use of the mails to transmit communications of the same or similar type here involved constitutes interstate commerce. See *North American Co. v. S.E.C.*, 327 U.S. 686, at 694-695 (a holding company's use of the "mails and facilities of interstate commerce," in order to "maintain its other relationships and contacts with its own subsidiaries," held to constitute interstate commerce); *Associated Press v. National Labor Relations Board*, 301 U.S. 103, at 128 ("interstate communication of a business nature, whatever the means of such communication, is interstate commerce \* \* \*"); *International Textbook Co. v.*



*Pigg*, 217 U.S. 91, at 107 ("intercourse or communication between persons in different States, by means of correspondence through the mails" is commerce among the States).<sup>14</sup>

To the same effect are *United States v. Underwriters Assn.*, 322 U.S. 533, holding insurance companies to be in interstate commerce by reason of the "interrelationship, interdependence, and integration of activities" in all States in which they operate, which resulted in "a continuous and indivisible stream of intercourse among the states composed of collections of premiums, payments of policy obligations, and the countless documents and communications \* \* \*" (322 U.S. at 541); *United States v. Shubert*, 348 U.S. 222, where the "transmission of applications, letters, memoranda, communications, commitments, contracts, money, checks, drafts and other media of exchange across State lines," occurring in the conduct of the business of producing locally legitimate stage attractions, was similarly held to constitute trade or commerce within the meaning of the Sherman Act; and *United States v. International Boxing Club of New York*, 348 U.S. 236, another Sherman Act case, decided the same day. These decisions, said the Court, accord with the "liberal con-

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<sup>14</sup> See also *Federal Trade Commission v. Civil Service T. Bureau*, 79 F.2d 113, at 114 (C.A. 6) "intercourse or communication between persons in different states by means of correspondence through the mails is commerce among the states \* \* \*, especially where such intercourse and communication relate to regular continuous business and to the making of contracts and the transportation of books, papers, etc., pertaining to such business"); and *Bay City v. Frazier*, 77 F.2d 570, at 574 (C.A. 6) (holding an engineering contract for the construction of an out-of-state municipal waterworks system to be an interstate transaction because its performance required, among other things, "regular and continuous interstate communication and intercourse").

struction" that had been given the Sherman Act (348 U.S. at 226). The Court has similarly emphasized that the Fair Labor Standards Act, also, is "one that has been given a liberal construction" (*Mitchell v. C. W. Vollmer & Co.*, 349 U.S. 427, 429). While admittedly there are differences in the scope of the Sherman Act and this Act, the Court's decisions in the above cases were not predicated on the "affecting commerce" scope of the Sherman Act, but were construing the statutory language "trade or commerce \* \* \* among the several States" (see *Shubert*, 348 U.S. at 226-227)—language identical to that of Section 3(b) of the Fair Labor Standards Act, which indeed goes further and expressly includes "transportation, transmission, or communication."

The Court's decisions are equally clear that interstate travel or movement of persons across state lines, even for non-commercial purposes, is interstate commerce. *Edwards v. California*, 314 U.S. 160 (movement of indigents across state lines is interstate commerce); see also *Hemans v. United States*, 163 F.2d 228, 239 (C.A. 6), certiorari denied, 332 U.S. 801 (upholding the validity of the Fugitive Felon Act, which restricted the movement of "one who travels in interstate commerce to avoid giving testimony in the state from which he flees"); *Caminetti v. United States*, 242 U.S. 470 (transportation of women across state lines for non-commercial immoral purposes is interstate commerce prohibited by the Mann Act); *Cleveland v. United States*, 329 U.S. 14 (transportation of a woman across state lines for purposes of a polygamous marriage is interstate commerce).

There is certainly nothing in the policy and purposes of the Fair Labor Standards Act which would warrant

straining to restrict its "in commerce" coverage as the decision below has manifestly done. On the contrary, such a restrictive construction of this Act is plainly inconsistent with this Court's ruling that "the purpose of the Act was to extend federal control in this field throughout the farthest reaches of the channels of interstate commerce" (*Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 567) and that "the policy of Congressional abnegation with respect to occupations affecting commerce is no reason for narrowly circumscribing the phrase 'engaged in commerce'" (*Overstreet v. North Shore Corp.*, 318 U.S. 125, 128). It is also inconsistent with the well-settled principle, most recently emphasized by this Court in *Mitchell v. Vollmer*, that the statutory terms of coverage of this Act must be given a "liberal" construction (349 U.S. at 429), and that the literal terms of the statutory definitions should be accorded the "breadth of coverage" consistent with the "terms of substantial universality" in which the broad purposes of the Act are stated (*Powell v. United States Cartridge Co.*, 339 U.S. 497, 516). These were the principles underlying recent decisions of the Eighth and First Circuits which upheld the coverage of interstate travel and interstate communications in circumstances comparable to the instant case. (*Mitchell v. Kroger Co.*, 248 F.2d 935 (C.A. 8), and *Aetna Finance Co. v. Mitchell*, 247 F.2d 190 (C.A. 1).

*Kroger* involved the coverage of interstate travel and interstate communications of auditors employed by a multi-state chain organization to make audits at its local retail units in two states, and to transmit their auditing reports to branch/headquarters. Pointing out



that such communication and travel are "‘transportation, transmission and communication’ between states within the meaning and the literal terms of the statute" (248 F.2d at 939), the Eighth Circuit held that there is "nothing to justify Congressional intent to the contrary," and that, "[i]nstead of a strict or limited construction," this Court's decisions required "a liberal construction" of the statutory terms of coverage—in particular a construction that does "not narrowly circumscribe the meaning of the phrase ‘engaged in commerce’ or detract in any way from the statutory definition as to the meaning of commerce itself" (*id.* at 938, emphasis added). *Kroger* held not only that the auditors' interstate communication and travel were "literally within the Act's coverage" (*ibid.*), but also, on the basis of practical facts comparable to those here, that such interstate communication and travel were not "merely incident to a local retail business" but were "a part and parcel of the Kroger Company's interstate activity" (*id.* at 939).

In *Aetha Finance*, the First Circuit held that employees of a branch office of a small loan company were engaged "in commerce" by reason of their interstate communication, correspondence and transmission of various reports and documents; even though over 95% of the branch office's business consisted of loans to local borrowers within the same state. The court found no difficulty in agreeing with the District Court's ruling that coverage of these activities was sufficiently sustained *either* by reason of the small proportion of the branch's business with out-of-state borrowers *or* by reason of the relationship of the branch employees'

work "to the conduct and furtherance of defendant's nationwide business" under the "broad guiding principles" of this Court's decisions (247 F.2d at 192, affirming 144 F.Supp. 528 at 533).<sup>15</sup>

The sole reason stated in the decision below for not applying what the court itself recognized as "this well-established line of authority" (R. 150a) was its mistaken assumption that the *employers'* business here is not interstate in character but is "essentially local" and that, therefore, the interstate communication and travel "is merely incidental to the local enterprise" (R. 151a). This assumption, as pointed out *supra*, pp. 20-21, 24 fn. 6, 31-35, is contradicted by the undisputed evidence in this record. The interstate communications and travel by respondents' employees are undeniably necessitated by and essential to respondents' two-state administrative organization, its overseas associations and its extensive interstate operations both for out-of-state clients and for interstate instrumentalities or facilities. Whatever justification there might be for excluding from the coverage of the Act interstate communications and travel which are merely incidental to an otherwise purely local business,<sup>16</sup> there

<sup>15</sup> The ruling below on interstate communication is also in conflict with the decision of the District Court in *Durkin v. Joyce Agency, Inc.*, 110 F.Supp. 918 (N.D. Ill.), which was affirmed *per curiam* by this Court *sub nom. Mitchell v. Joyce Agency, Inc.*, 348 U.S. 945, reversing the Seventh Circuit's decision (211 F.2d 241), which had held specifically, *inter alia*, that so-called "internal" interstate communication was not within the coverage of the Act.

<sup>16</sup> It is *not* the Government's position that *any* interstate correspondence, even though merely incidental to a purely local business or professional practice, is within the Act's coverage. On the contrary, the administrative interpretation has expressly stated that the Act's coverage of interstate communication "does not mean that any use by an employee of the mails and other channels of communication is sufficient to establish coverage," but only where the

is no reasonable ground to be found in either the terms or purposes of this Act for excluding from its coverage employees regularly engaged in the interstate activities necessitated by the nature and organization of a business which has the admitted interstate aspects and extensive interstate operations of respondents' business.

*C. The Preparation of Plans, Specifications and Drawings for Transmission Across State Lines, or for Use in the Construction of Repairs or Improvements to Interstate Instrumentalities and Facilities, Constitutes "Production of Goods for Commerce."*

Apparently both courts below concede that, if the plans, specifications and drawings are "goods" within the meaning of the statutory definition in Section 3(i), the employees preparing them are "producing" ("handling, transporting, or in any other manner working on") them for "commerce" ("transmission \* \* \* between any State and any place outside thereof") within the terms of Sections 3(j) and (b) of the Act. Since a substantial portion of these plans and specifications are prepared specifically for use in the repair or improvement of interstate instrumentalities or facilities, they are also, we submit, produced "for commerce"

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employee's duties require such "regular and recurrent" and "continued" use. (Interpretative Bulletin on General Coverage, Part 776.10, May 1950, 15 F.R. 2925). This distinction has been made specifically with respect to correspondence and communications merely incidental to an ordinary local practice of law, medicine or other profession, so that coverage is asserted only where the practice is so conducted as to necessitate regular and continuous interstate communication with out-of-State clients or with closely affiliated out-of-State offices or associates (as is manifestly the nature of respondents' operations).



no less than the preparation of road materials for these same purposes held to be within the Act's coverage in *Alstate Construction Co. v. Durkin*, 345 U.S. 13, and *Thomas v. Hempt Bros.*, 345 U.S. 19. Moreover, this work is "production of goods for commerce," whether or not the plans and specifications themselves are regarded as "goods."

1. The view that plans and specifications are not "articles or subjects of commerce" within the statutory definition of Section 3(i) simply because they represent the "embodiment of ideas" (R. 148a) is difficult to reconcile with the ruling in *Western Union Telegraph Co. v. Lenroot*, 323 U.S. 490, that "telegraphic messages are clearly 'subjects of commerce' and hence that they are 'goods' under this Act," since prior to the adoption of the statutory definition it had been held (in *Western Union Telegraph Co. v. Pendleton*, 122 U.S. 347) that "'ideas, wishes, orders, and intelligence' are 'subjects' of the interstate commerce in which telegraph companies engage" (323 U.S. at 502-503). As pointed out by Judge Learned Hand in the Second Circuit's decision in *Western Union*, the legislative history contains "unmistakable evidence of a purpose to extend the definition of subdivision [3]i to everything which had been considered a 'subject of commerce'; that is, to whatever Congress could regulate as such a subject" (141 F.2d 400 at 403).<sup>17</sup> The bill as originally

<sup>17</sup> This Court expressly approved the rulings of the Court of Appeals on the meaning of the statutory definitions of "goods" and "produced" (323 U.S. at 502-504), although it reversed on the wholly different ground that the physical tangible "message" "never leaves the originating office" and hence was not "shipped" within the terms of Section 12(a) of the Act, (*id.* at 505-506)—i.e., "the difficulty there was that the telegrams, taken as documents, were not 'shipped' across a state line" (see *Bozant v. Bank of New York*, 156 F.2d 787, 790 (C.A. 2), emphasis added).

introduced defined "goods" as "goods, wares, products, commodities, merchandise, or articles of trade of any character" (Section 2(a)(21) of S. 2475 and of H.R. 7200, 75th Cong., 1st Sess.). The Senate Committee on Education and Labor changed "trade" to "commerce" and added the words "or subjects" after the word "articles," thus putting the definition into its present form. (See S. 2475, Committee Print to Accompany S. Rep. 884, 75th Cong., 1st Sess.). "[I]t must always be remembered," a subsequent decision of the Second Circuit reiterated, that Section 3(i) "was amended in Congress to go beyond 'wares, products, commodities, merchandise, or articles,' and in addition to include 'subjects of commerce of any character.'" (*Bozant v. Bank of New York*, 156 F.2d 787, at 790).

The physical embodiment of mental ideas into tangible and bulky plans and specifications is obviously the product of considerable routine, clerical and other physical work, as is evident from a mere glance at some of the plans and specifications for industrial projects involved in this case. These physical products are tangible materials which can be and are "subjects of commerce" (i.e., interstate "transportation" or "transmission") within the literal terms of the statutory definitions; and their physical production unquestionably requires the type of routine, clerical, and physical workers with whom this Act is concerned.

The rationale of the *Western Union* decision has been applied by other Courts of Appeals and by the district courts to a wide variety of documents comparable to the plans, specifications and documents in this case. See *Baldwin v. Emigrant Industrial Savings Bank*, 150 F.2d 524 (C.A. 2), certiorari denied, 326 U.S. 767 (mimeographing and setting type for "advertising

matter" and "reading, editing, and preparing \* \* \* manuscripts for the printer" held "production of goods"); *Bozant v. Bank of New York*, 156 F.2d 787, 790 (C.A. 2) ("preparing, executing or validating bonds, shares of stock, commercial paper, bills of lading and the like" held "production of goods");<sup>18</sup> *Darr v. Mutual Life Insurance Co.*, 169 F.2d 262, 264-265 (C.A. 2), certiorari denied, 335 U.S. 871 (insurance policy applications and insurance policies are "goods produced for commerce"); *Ullo v. Smith*, 177 F.2d 101 at 104 (C.A. 2), affirming as "clearly correct" the ruling of the district court (62 F.Supp. 757 at 762) that the gathering, stenciling and mimeographing of "news regarding New York merchandising and markets" for distribu-

<sup>18</sup> While the *Bozant* ruling was limited to "commercial" documents such as "bonds, shares of stock, commercial paper, bills of lading and the like," and excluded "mere writing of letters or the drawing of papers, which have no value of their own except as records" (156 F.2d at 790), it did not foreclose the conclusion that "the preparation of advertisements, brochures, pamphlets and other advices mailed out to customers," also, "may be a production of 'goods' though it be only auxiliary to a business that involves no other production" (*id.* at 789). The plans and specifications in the instant case, we submit, are plainly more of this tangible, utilitarian character than mere letter-writing or records.

Indeed, the use made of the plans and specifications—by bidders, contractors, suppliers of materials, as well as by the construction crews—can hardly be characterized as "non-commercial."

Moreover, *Bozant's* emphasis on the "commercial" character of the documents must be discounted by the fact that the decision (handed down July 8, 1946) antedated this Court's decision in *Powell v. United States Cartridge Co.* (decided May 8, 1950), discussed in the text, *infra*, pp. 46-47). Similarly, the district court's decision in *McComb v. Turpin*, 81 F.Supp. 86 (D. Md.) (decided November 30, 1948), on which the court below heavily relied (R. 146a-147a) antedated *Powell*, and rested on the rationale (repudiated in *Powell*) that the statutory definition of "goods" includes only products or articles of a "commercial character" that are "sold or offered for sale to the public generally" (81 F.Supp. at 89, 90).



tion to subscribers is "production of goods"; *Union National Bank of Little Rock v. Durkin*, 207 F.2d 848, 849, 850 (C.A. 8) (holding that it is "no longer \* \* \* open to question" that preparation and handling of "stocks, bonds and other securities" and "checks, notes, drafts, and other commercial paper" by bank employees, and of "policy applications, policies, premium payments, claims and benefit payments," by insurance company employees constitute "production of goods for commerce"); *Meeker Cooperative Light and Power Assn. v. Phillips*, 158 F.2d 698, 699 (C.A. 8) (affirming the district court's ruling (63 F.Supp. 733, 740) that the preparation of "correspondence, reports, fiscal statement, checks and other documents" constitute "production of goods").<sup>19</sup>

2. The view that such work is outside the contempla-

<sup>19</sup> To the same effect are the following district court decisions: *Lofther v. First National Bank of Chicago*, 48 F. Supp. 692, 697 (N.D. Ill.) affirmed on other grounds, 138 F.2d 299 (C.A. 7) (banking documents, written reports, correspondence and accounts prepared by an accountant); *Hogue v. National Automotive Parts Assn.*, 87 F.Supp. 816 (E.D. Mich.) (gathering and compiling statistical data as to prices, business activity and similar matters, and distributing it to members of a trade association); *Mathisen v. Evanston Trust Bank* (not officially reported but found in 6 WH Cases 882, 12 Labor Cases ¶ 63,726 (N. Ill., 1947) (checks, drafts, and other commercial paper); *Durkin v. Shone*, 112 F.Supp. 375 (E.D. Tenn.) (addressing, handling and mailing advertising materials); *Hanzely v. Hooven Letters, Inc.*, 44 N.Y.S. 2d 398 (City Court N.Y. 1943) (advertising letters); *Mitchell v. Tippet* (not officially reported but found in 13 WH Cases 774 and 35 Labor Cases, para. 71,723 (W.D. N. Car., June 25, 1958) (printing bank check forms and miscellany of other commercial business forms); *Thomas et al. v. Associated Cleaning Contractors* (not officially reported, but found in 13 WH Cases 777 and 35 Labor Cases, para. 71,724) (N.D. Ga., July 12, 1958) (preparation of printed and mimeographed tariff catalogs, statistics and information reports for members of motor carriers association, and preparation of credit investigation reports for customers of retail credit company).

tion of the Act because it is *incidental* to professional planning and advice is contradicted by *Borden Co. v. Borella*, 325 U.S. 679, where maintenance employees of Borden's central office building for its executive officers and administrative employees were held within the Act's coverage, on the ground that the "economic production" with which this Act is concerned includes "not simply the manual physical labor involved in changing the form or utility of a tangible article" but also "planning and controlling" and the work of one "who conceives or directs a productive activity" (325 U.S. at 683). The apparent confusion by the court below of the Act's "professional" exemption (Section 13(a)(1)) with the Act's general coverage provisions is contrary to this Court's explicit statement that: "Indeed, the fact that § 13(a)(1) specifically excludes \* \* \* those employees employed in a bona fide executive, administrative or professional capacity is clearly consistent with the conclusion that these activities are included within" the coverage of the Act, and "that full effect should be given that fact unless otherwise provided" (325 U.S. at 684).<sup>20</sup>

3. Similarly, the position that plans and specifications are not "goods for commerce" because they lack the characteristics of ordinary articles sold commercially to the public generally (R. 148a-149a) is contrary to the basic rationale of *Powell v. United States Cartridge Co.*, 339 U.S. 497, which explicitly repudiated the contention that coverage is limited to "commercial" transactions or to "articles that are intended for sale, exchange or other trading activities" (339 U.S. at 512), and emphasized the "terms of sub-

<sup>20</sup> The "professional" exemption is not involved in the present case. See footnote 1, *supra*, p. 3.

stantial universality" in which the broad statutory purposes and the statutory coverage definitions are stated (*id.* at 509-516). "Breadth of coverage was vital to its mission" (*id.* at 516), said the Court, and the primary legislative purpose "was concerned directly with any widespread existence of substandard wages, hours or working conditions" which "could be reached by Congress through its regulation of interstate transportation of the products of those conditions" (*id.* at 509-510, fn. 12). Quoting the statutory definition of "commerce" with emphasis on the language "*transportation \* \* \* among the several States or from any State to any place outside thereof*" (*ibid.*, emphasis the Court's), the Court ruled that this language includes "interstate shipments or transportation as such, and not merely \* \* \* shipments or transportation of articles that are intended for sale, exchange or other trading activities," citing at this point previous decisions holding that the federal "commerce" power extended to all kinds of "non-commercial" interstate movements and transactions (*id.* at 512). The broad scope of the *Powell* decision's construction of the term "articles, or subjects of commerce of any character" is indicated by its reliance (*ibid.*, fn. 14) upon such decisions as *Edwards v. California*, 314 U.S. 160 (movement of indigents across state lines); *Thornton v. United States*, 271 U.S. 414 (diseased cattle ranging across state lines); *Caminetti v. United States*, 242 U.S. 470 (transportation of women across state lines for non-commercial immoral purposes); *United States v. South-Eastern Underwriters Assn.*, 322 U.S. 533 (insurance transactions, including transactions and communications between local agents and their out-of-state home offices).



4. The reasoning below is also inconsistent with *Alstate Construction Co. v. Durkin*, 345 U.S. 13, since the preparation of plans and specifications specifically for use in the improvement of interstate facilities cannot be distinguished from the preparation of road materials for these same purposes, except on the unwarranted assumption that the statutory definition of "goods" is limited to "products" ordinarily sold to the public. The preparation of the plans and specifications for a specific highway improvement project, no less than the preparation of the road materials pursuant to those plans and specifications, directly serves the interstate commerce on that highway. While the road materials may be physically incorporated into the road, the plans and specifications guide and determine the execution of the improvement in every detail (including the instructions and specifications for the supplies and materials to be physically incorporated in the structures) from the beginning to the end of the construction work, and are thus equally "for" the "main [interstate commerce] job even though preliminary to it and unseen or nonexistent in the final product." Cf. *Archer v. Brown & Root, Inc.*, 241 F. 2d 663 (C.A. 5), at 669.<sup>21</sup> Both "serve commerce" and are produced specifically and directly "for commerce" in the same degree.

Even if such plans and specifications are not themselves "goods," their preparation is at least a "closely related process or occupation directly essential" to the production of the supplies and materials "for" such commerce. For there can be no question, under the *Alstate* and *Hempt* (*Thomas v. Hempt Bros.*, 345 U.S. 19) decisions, that the materials and supplies produced

<sup>21</sup> This statement, made in connection with the Fifth Circuit's holding in *Archer* that construction of the prefabricating plant was "in commerce" (see *supra*, p. 28), is a *fortiori* applicable here.

for physical incorporation into the interstate instrumentalities are "goods" produced for commerce, and the plans and specifications are no less "closely related" or "directly essential" to the production of these goods than the preparation of "tools, dies, designs, patterns \* \* \* or other equipment" used by the purchaser "in the production of other goods for interstate commerce," or the furnishing of gas, electricity, fuel or water for use in the production of goods for commerce, which Congress has expressly recognized as "closely related and directly essential to the production of goods for commerce" within the terms of Section 3(j), as amended in 1949. See House Conferees' Report of the 1949 Amendments, 95 Cong. Rec. 14874, 14875;<sup>22</sup> and Report of the Majority of Senate Conferees, 95 Cong. Rec. 14928, 14929.<sup>23</sup> See also, *supra*, p 32.

<sup>22</sup> "The work of employees of employers who produce or supply goods or facilities for customers engaged within the same State in the production of other goods for interstate commerce may also be covered as closely related and directly essential to such production. This would be true, for example, of employees engaged in the following activities:

1. Production of tools, dies, designs, patterns, machinery, machinery parts, mine props, industrial sand, or other equipment used by purchaser in producing goods for interstate commerce. *Holland v. Amoskeog Machine Co.* (44 F.Supp. 884 (D.C. N.H.)); *Tormey v. Kiekhafer Corp.* (76 F.Supp. 557 (E.D. Wis.)); *Walling v. Amidon* (153 F. (2d) 159 (C.A. 10)); *Walling v. Hamner* (64 F.Supp. 690 (W.D. Va.)); *Roland Electrical Co. v. Walling* (326 U.S. 657)." (Emphasis added.)

<sup>23</sup> "The bill as agreed to in conference also does not affect the coverage under the act of employees who repair or maintain buildings in which goods are produced for commerce (*Kirschbaum v. Walling*, 316 U.S. 517) or who make, repair, or maintain machinery or tools and dies used in the production of goods for commerce. Likewise, employees of public utilities, furnishing gas, electricity or water to firms within the State engaged in manufacturing, producing, or mining goods for commerce, will remain subject to the act. All the employees mentioned in this paragraph are doing work that is closely related and directly essential to the production of goods for commerce."

5. Finally, the Fourth Circuit's reliance on the paragraph in the Labor Department's Interpretative Bulletin relating to employees of a "local architectural firm," (R. 147a) is misplaced. The term "local architectural firm," and the paragraph in the Interpretative Bulletin, are patently not descriptive of respondents' multi-state practice or of its extensive engineering operations. The statement in the bulletin is merely a restatement (indeed, a quotation) of legislative history from the House Conferees' Report on the 1949 Amendments, which refers only to "the preparation of plans for the alteration of buildings *within the state* which are used to produce goods for interstate commerce." (95 Cong. Rec. 14929, par. 5, emphasis added.) It is expressly limited to a "local" business conducted *within the confines of a single state* and related to interstate commerce only indirectly and remotely by reason of the fact that some of the local buildings for which it prepares plans may be "used to produce goods for interstate commerce." This is hardly descriptive of respondents' architectural-engineering enterprise which is not only specifically organized so as to conduct its operations across state lines, but is also engaged extensively in work for out-of-state projects and out-of-state clientele, and, in addition, engages directly and substantially in work for the improvement and expansion of interstate instrumentalities and facilities. The content of the term "local architectural firm" is evident from the other examples cited in the legislative history immediately preceding and following the reference to a "local architectural firm"—i.e., "a local independent nursery concern" whose business might include "mowing the lawn around the plant of a customer *within the state* engaged in producing goods for interstate commerce," and "a local exterminator service firm" whose



employees "work wholly within the state" serving generally "buildings within the state" some of which may be "used to produce goods for interstate commerce" (95 Cong. Rec. 14929, emphasis added).<sup>24</sup>

#### CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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AUGUST 1958.

<sup>24</sup> The court also relies (R. 147a) on footnote 28 of the Bulletin which contains a "see also" citation of *McComb v. Turpin*, 81 F.Supp. 88 (D. Md.). The Fourth Circuit's construction of this "see also" citation as an administrative acceptance and adoption of the reasoning and holding of that decision is, we submit, far-fetched and unwarranted. Even if the citation of that decision could be construed as an administrative acceptance of it, the factual record in the instant case is so different in crucial respects as to preclude any inference that the firm here involved qualifies as a "local architectural firm" within the meaning of the bulletin. As the opinion in the *Turpin* decision repeatedly emphasized, "the stipulation of facts [which was the sole evidence in that case] furnishes only meager information" (81 F.Supp. at 91), showing only that the employees' services related mostly "to the original construction of buildings rather than to additions or alterations" (*id.* at 88), and, particularly, that it was "not contended in this [the *Turpin*] case that any of the defendants' employees are engaged in interstate commerce" as distinguished from the "production of goods for commerce" (*id.* at 88; see also 80, 92, 94; emphasis the court's). It was because of the meagerness and deficiencies in the record that the decision not to appeal the *Turpin* case was made.

## APPENDIX

**RESPONDENTS' PROJECTS FOR IMPROVEMENT, REPAIR OR ENLARGEMENT OF INTERSTATE INSTRUMENTALITIES OR FACILITIES****1. AIRFIELDS AND AIRPLANE FACILITIES**

Widening streets on a naval operating base in the vicinity of the base motorpool and post exchange, and extending and paving plane taxiways and parking aprons at the Naval Air Station installation at Oceana, Virginia, which is a naval jet base and part of the East Coast defense system for intercepting enemy aircraft (Stip. R. 16a; Job No. 928, R. 25a). Replacing paving between hangars at the Naval Air Station at Norfolk, Virginia (Stip. R. 16a; Job No. 881, R. 22a). It was agreed at the trial that the Navy airplanes using both these facilities regularly fly across State lines (R. 84a).

Repair and alterations of hangars at the Naval Air Station at Oceana, Virginia (a naval jet air base, part of the East Coast defense system for intercepting enemy aircraft) (Jobs Nos. 892, 892-1; Stip. R. 16a, 22a, 23a); the Naval Air Station in Washington, D. C. (Job No. 963, R. 29a, repairs to three hangars); and the Naval Air Station at Norfolk, Virginia (Job No. 901, R. 23a) (alterations to Hangars LP4 and LP14); advance planning for runway extension, Byrd Field (Job No. 822, R. 20a); advance planning report for pneumatic test facility, Naval Air Station, Norfolk, Virginia (Job No. 921, R. 25a); estimates for Pinecastle Air Force Base, Florida (Job No. 833, R. 21a); pile test, Langley Field, Virginia (Job No. 835, R. 21a); estimates for Beaufort, South Carolina, Airfield (Job No. 882, R. 22a); advance planning, Naval Air Station, Norfolk, Virginia (Job No. 748, R. 18a)

and work relating to Patuxent Air Station, Maryland (Job No. 869, R. 22a).

## 2. SHIPYARDS

Repairs to buildings located at the United States Navy Ship Yard, Portsmouth, Virginia (Job No. 948, R. 28a—repairs to 10 buildings, and Job No. 952, R. 28a—repairs to buildings) and other miscellaneous projects (Jobs Nos. 853 and 903; R. 21a, 23a); repairs to Pier 12, Naval Operating Base, Norfolk, Virginia (Job No. 965, R. 29a); and work relating to the machine shops and administrative buildings at the Norfolk Navy Yard and Norfolk Naval Base, Norfolk, Virginia (Stip. R. 16a; Job No. 920, R. 25a).

## 3. RADIO AND TELEVISION FACILITIES

Relocation of the Coast Guard Radio Station at Oceana, Virginia (Job Nos. 785, 917, R. 19a, 24a). Making the necessary site examination and preparing the advance planning report for relocating the Coast Guard Radio Station at Oceana, Virginia, which is a part of the Oceana Naval Air facility. When the new station is completed, the old station will be abandoned. A letter of intent to proceed with the final plan and specifications for this project has been received by appellees from the Navy (R. 69a-70a). Work relating to television station WAVY, Portsmouth, Virginia (Job No. 754, R. 18a).

## 4. TURNPIKE AND ROAD IMPROVEMENTS, BUS TERMINAL REPLACEMENT AND WATER AND SEWER UTILITIES

Road improvements, Oceana, Virginia (Job No. 911, R. 24a); Richmond Turnpike (Job No. 814, R. 20a); Old Dominion Turnpike Authority (Job No. 847, R. 21a); road survey, Columbia, North Carolina (Job No. 788, R. 19a). Replacement of the Trailways Bus



Terminal in Washington, D. C. (R. 90a). Numerous water and sewer designs for the Washington Sanitary Commission (Job Nos. 893, 893-1 through 893-3, 939, 939-1 through 939-24; R. 23a, 26a-27a).

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**No. 37**

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**In the Supreme Court of the United States**

**OCTOBER TERM, 1958**

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**JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED  
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**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE FOURTH CIRCUIT**

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**REPLY BRIEF FOR THE PETITIONER**

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# **In the Supreme Court of the United States**

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**No. 37**

**JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED  
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**v.**

**LUBLIN, McGAUGHY & ASSOCIATES, ET AL.**

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**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
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---

**REPLY BRIEF FOR THE PETITIONER**

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Two contentions advanced by respondents were not discussed in petitioner's main brief because, although strenuously urged in the courts below, they were apparently considered of no substance by the Court of Appeals as they are not even mentioned in the otherwise comprehensive treatment of the grounds for its decision. The *first* is that work on military installations is outside the coverage of the Fair Labor Standards Act because "military installations must be assumed to be instrumentalities of war, and *not* of commerce" (Respondents' Br., pp. 5, 14), and *second* that the greater part of their work "is placed beyond the coverage of the Act" by the "new construction" doctrine

(*id.*, pp. 5-6). These two contentions were doubtless passed over by the Court of Appeals because of its recognition that their unsoundness had already definitely been established by this Court's decisions in *Powell v. United States Cartridge Co.*, 339 U. S. 497; *Mitchell v. Vollmer & Co.*, 349 U. S. 427; and *Southern Pacific Co. v. Gileo*, 351 U. S. 493, 500. A third argument urged by both respondents and *amicus curiae*—that the substantial interstate communications, interstate transmission of documents and interstate travel, regularly engaged in by respondents' employees, do not constitute "transportation, transmission, or communication among the several States" within the scope of the Fair Labor Standards Act because the coverage of this Act was not intended to be coextensive with Congress's constitutional power—although anticipated and answered in our main brief (pp. 34-41)—can, we believe, be conclusively clarified by the legislative history bearing on the Congressional intent in deleting the "affecting" commerce language.

## I

THIS COURT'S POWELL DECISION SETTLED THE UNSOUNDNESS OF RESPONDENTS' CONTENTION THAT WORK ON AN INSTRUMENTALITY OF WAR CANNOT BE WORK ON AN INSTRUMENTALITY OF "COMMERCE" WITHIN THE SCOPE OF THE FAIR LABOR STANDARDS ACT

The contention that because activities may be for military or war purposes they cannot be "commerce" within the scope of the Fair Labor Standards Act was definitely repudiated, more than eight years ago, by this Court's *Powell* decision (decided May 8, 1950). That decision specifically held within the



coverage of the Act the production and transportation of military munitions solely for the use of the United States Army for war purposes. In answer to "the precise question \* \* \* whether the munitions were produced for 'commerce' when such production was for transportation outside of the state and for use by the United States in the prosecution of war, but not for sale or exchange" (339 U. S. at 511), the Court quoted this Act's statutory definition of "commerce" and ruled that the language includes "interstate shipments or transportation as such, and not merely \* \* \* shipments or transportation of articles that are intended for sale, exchange or other trading activities," citing at this point its previous decisions holding that the federal "commerce" power extended to all kinds of "non-commercial" interstate movements and transactions (*id.* at 512).<sup>1</sup> Pointing out that "the primary purpose" of the Act was "not [simply] to regulate interstate commerce as such" but "to eliminate, as rapidly as practicable, substandard labor conditions throughout the nation" and "to raise living standards without substantially curtailing employment or earning power," the Court noted particularly that the "Government's munitions plants provided an appropriate place for the beneficial ap-

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<sup>1</sup> *E. g., Edwards v. California*, 314 U. S. 160 (movement of indigents across state lines); *Thornton v. United States*, 271 U. S. 414 (diseased cattle ranging across state lines); *Caminetti v. United States*, 242 U. S. 470 (transportation of women across state lines for non-commercial immoral purposes); *United States v. South-Eastern Underwriters Assn.*, 322 U. S. 533 (insurance transactions, including transactions and communications between local agents and their out-of-state home offices).

plication of the Act's standards of working conditions without danger of reduced employment through loss of business" (*id.* at 510-511).

Respondents, ignoring *Powell*, rely upon lower court decisions which antedated *Powell* (*Laudadio v. White Construction Co.*, 163 F. 2d 383 (C. A. 2) and *Divins v. Hazeltine Electronics Corp.*, 163 F. 2d 100 (C. A. 2), Br., p. 14), and which, on this point, are plainly inconsistent with the principles of *Powell*. The reasoning of the *Powell* decision is patently as applicable to military installations which are instrumentalities of interstate commerce as to the production of munitions transported interstate—and this has been recognized by the lower court rulings subsequent to *Powell*. See *Mitchell v. Empire Gas Engineering Company*, 256 F. 2d 781, at 783 (C. A. 5):

The differences between production of goods for commerce and the engaging in commerce are not such as to exclude the latter from the rationale of the *Powell* decision. Cf. *Alstate Construction Co. v. Durkin*, 345 U. S. 13, 73 S. Ct. 565, 97 L. Ed. 745. An instrumentality of war is not, solely by reason of being such, excluded from being an instrumentality of commerce.

See also *Mitchell v. Zachry Co.*, 127 F. Supp. 377, at 380 (D. N. Mex.) (holding that "the doctrine of the *Powell* case is applicable with equal force" to construction and improvement of runways at Holloman Air Force Base).<sup>2</sup>

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<sup>2</sup> Even the decisions which assumed (prior to *Powell*) that instrumentalities of war were not instrumentalities of commerce within the coverage of the Act recognized that military

## II

**RESPONDENTS' RELIANCE UPON THE "NEW CONSTRUCTION" DOCTRINE IS DIRECTLY CONTRARY TO THIS COURT'S DECISIONS IN *VOLLMER* AND *SOUTHERN PACIFIC CO. v. GILEO***

Respondents' contention that the "new construction" doctrine overrides the "liberal construction" principle in determining the coverage of work on construction projects (Br., p. 5) rests on a plain misapprehension of this Court's decision in *Vollmer*, 349 U. S. 427, *supra*.

air bases and shipyards are instrumentalities of commerce by reason of their unquestioned use "to facilitate the transportation of persons, mail and articles of commerce in general," as well as "for purely combat activities." *Scholl v. McWilliams Dredging Co.*, 169 F. 2d 729 at 732 (C. A. 2). On the same reasoning, employees working on cargo transports were held covered by the Act in *Divins v. Hazeltine Electronics Corp.*, *supra*. Also in *Laudadio*, *supra*, the same court held that the Floyd Bennett Airfield continued to be an instrumentality of commerce after it became an Air Force Base, on the ground (judicially noticed) that "it is extremely likely that the Navy did make some use of the Field for interstate commerce, such as the arrival and departure of officers, men and mail in interstate journeys," and accordingly held that work relating to "extending existing runways, reconstructing the control tower of the Administration Building and making additions to existing hangars, was work on *instrumentalities of commerce*" within the coverage of the Act (163 F. 2d at 385, emphasis added). To the same effect see *Ritch v. Puget Sound Bridge and Dredging Co.*, 156 F. 2d 334, 335 (C. A. 9, 1946), holding that the dredging of new channels in the harbor of the Bremerton Navy Yard for use by combat vessels was "commerce" within the coverage of the Act by reason of the use of combat vessels "in the transport of the mails of non-combatants as well as combatants" and "in the transportation from out of the states of commercial merchandise."

In view of the *Powell* decision, it is plain that this distinction between "commercial" use and "war" use is no longer significant.



*Vollmer*, of course, stands for precisely the opposite of respondents' interpretation. If there were any doubt of the import of *Vollmer* itself, it was unmistakably resolved by the express statement shortly thereafter in *Southern Pacific Co. v. Gileo*, 351 U. S. 493 at 500, that "[t]his Court recently rejected the 'new construction' doctrine in determining whether an employee is 'engaged in commerce' within the meaning of \* \* \* the Fair Labor Standards Act [citing *Vollmer*]." The fact that respondents' plans and specifications are for "new" structures, therefore, does not mean that they are outside the scope of this Act. On the contrary, since, as the court below found, the projects for which respondents prepare plans, specifications, etc. "include, primarily, projects for the improvement, enlargement and repair" of "interstate instrumentalities" such as "airfields, shipyards and radio stations for the United States military services" (R. 144a, 146a), they fall directly within the coverage principles of the *Vollmer* decision (see the numerous decisions cited in petitioner's main brief, pp. 21-22, n. 5).

### III

THERE IS NO MERIT IN THE CONTENTION THAT EMPLOYEES ENGAGED IN INTERSTATE ACTIVITIES INDISPUTABLY WITHIN THE STATUTORY TERMS OF COVERAGE ARE EXCLUDED FROM THE ACT BECAUSE ITS COVERAGE WAS NOT MADE FULLY COEXTENSIVE WITH THE FEDERAL CONSTITUTIONAL POWER TO REGULATE MATTERS "AFFECTING" COMMERCE

Despite the indisputable fact that the regular and substantial interstate communications, interstate transmission of documents, and interstate travel in this case are "transportation, transmission, or communica-

tion among the several States" within the literal terms of the statutory definition (Section 3 (b)), respondents and the *amicus curiae* contend that these activities are excluded from the Act's coverage because they merely "affect or indirectly relate to interstate commerce" and Congress did not intend to extend its regulation "to the furthest reaches of federal authority," citing *McLeod v. Threlkeld*, 319 U. S. 491 (Respondents' Br., pp. 16-17; Amicus Br., pp. 39, 42). This argument, in addition to its erroneous factual characterization of these interstate activities as "merely incidental" to a "primarily intrastate" operation or business (see petitioner's main brief, pp. 19-20, 24, 40-41), ignores the distinction expressly made in *McLeod* itself between activities which merely "affect" commerce and activities which "are actually in or so closely related to the movement of the commerce as to be a part of it" (319 U. S. at 497). The interstate activities of respondents' employees clearly are not merely activities which "affect or indirectly relate to interstate commerce" but are themselves "actually in" and "a part of" interstate "transportation, transmission, or communication."

A. The view that Congress must not have intended these statutory terms to have full scope, but must have meant to limit their application to *employers* engaged in such activities as the primary "trade" or "business," manifestly rests upon a lack of awareness of the legislative history of this Act and, in particular, upon a misapprehension of the import of the legislative deletion of the provision in earlier bills relative to *intrastate* activities "affecting commerce."

It is of course true, as this Court has several times pointed out, that the deletion of the "affecting commerce" provision is clear evidence that "Congress did not exercise in this Act the full scope of the commerce power" (*Walling v. Jacksonville Paper Co.*, 317 U. S. 564 at 570-571; *Kirschbaum Co. v. Walling*, 316 U. S. 517 at 522; *McLeod v. Threlkeld*, *supra*). However, the Court has also repeatedly emphasized that Congress did intend the *statutory* terms of coverage to have full scope, and that these terms must be liberally construed. The Court has taken pains to explain that "the policy of Congressional abnegation with respect to occupations affecting commerce is no reason for narrowly circumscribing the phrase 'engaged in commerce'" (*Overstreet v. North Shore Corp.*, 318 U. S. 125, 128), for "the purpose of the Act was to extend federal control in this field throughout the farthest reaches of the channels of interstate commerce" (*Jacksonville*, *supra*, 317 U. S. at 567), and the literal terms of the statutory definitions should be accorded the "[b]readth of coverage" intended by the "bold and sweeping terms" in which the Act's purposes were declared and the "terms of substantial universality" in which "[i]ts scope was stated" (*Powell*, *supra*, 339 U. S. at 516; see also *Roland Electrical Co. v. Walling*, 326 U. S. 657, 668-671; *Mabee v. White Plains Pub. Co.*, 327 U. S. 178, 181-182).

This Court's decisions have frequently reviewed or referred to the legislative history supporting the broad construction of the statutory coverage terms. If carefully read, these decisions suffice to establish the lack of merit in the type of argument here advanced



by respondents and *amicus curiae*. However, in view of the persistent recurrence of the charge that coverage of this Act has been administratively stretched beyond the original legislative intent, a brief review of the perhaps forgotten legislative history relating to the deletion of the "affecting commerce" language may be helpful. To that we now turn.

B. 1. As the Court noted in *Kirschbaum, supra* (one of the earliest decisions construing the coverage of this Act, June 1, 1942), the bill recommended by the conference committee, which was enacted into law, did not adopt the provisions of the House bill which would have applied to employers "engaged in commerce in any industry affecting commerce," nor did it include the provision of the original bill which "incorporated the *Shreveport* doctrine \* \* \*, in that it was specifically made applicable to *intrastate* production which competed with goods produced in another State" (316 U. S. at 522-523, emphasis added).\*

There is no question that earlier bills were aimed at taking full advantage of the federal constitutional power to regulate commerce, both to the extent that its exercise had been upheld previously and as it might be construed in the future.<sup>†</sup> The sweeping

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\* The *Shreveport* doctrine takes its name from the main locality involved in the classic case of *Houston & Texas Ry. v. United States*, 234 U. S. 342.

<sup>†</sup> One of the main objectives undoubtedly was to retain, insofar as might prove constitutionally feasible, some of the improved labor standards of the industry codes under the ill-fated National Industrial Recovery Act (held unconstitutional in *Schechter Poultry Corp. v. United States*, 295 U. S. 495, May 27, 1935), which had undertaken regulation of wages and hours in substantially all industry "throughout the

purpose of the original bill was stated to be "the *elimination* of substandard labor conditions in occupations *in and directly affecting* interstate commerce" (emphasis added).<sup>1</sup> As explained by Assistant Attorney General Jackson at the outset of the Joint Hearings:<sup>2</sup>

The Supreme Court has upheld various types of regulation of interstate commerce upon several distinct constitutional theories. The attempt is to consolidate in a single bill all hopeful approaches to constitutionality, each complete in itself, so that if one or more falls at the hands of the Court, we will not be left

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country" "without \* \* \* limitation" to activities "in" or "affecting" interstate commerce. See *id.*, 295 U. S. at 542; see also Joint Hearings before the Senate Committee on Education and Labor, and the House Committee on Labor, on S. 2475 and H. R. 7200, 75th Cong., 1st Sess., pp. 25-26, 64-65, 73, 155-172, 174-175; Robert L. Stern, *The Commerce Clause and the National Economy, 1933-1946*, 59 Harvard Law Review 645, at 661-664, 684.

The disclaimers by the sponsors of the proposed bill that it was unlike N. R. A., although it was "popularly called a new N. R. A." (see Joint Hearings, p. 25), obviously had reference to the careful efforts to keep the proposed bills within constitutional limits, both with respect to the commerce power and the delegation of legislative power.

<sup>1</sup> The subsequent bill, passed by the House, deleted the word "directly" preceding the term "affecting commerce" (see H. Rept. No. 2182, 75th Cong., 3d Sess.). However, this omission was undoubtedly counterbalanced by the standards and procedures prescribed for determination that an industry was one "affecting commerce," which was made a prerequisite to any application of the statutory standards (see *infra*, pp. 17-18).

<sup>2</sup> Joint Hearings, cited *supra*, fn. 4.

for an interval while a new bill is being adopted.  
[Hearings, p. 2].'

It was an "effort to get into one bill all of the avenues by which the bill can be held constitutional," so as "to take advantage of whatever theories may prevail on the Court at the time that the case is heard" (*id.*, p. 54).

Against this background, the question with which we are here concerned is: To what extent were the deleted "theories" or "approaches" (mentioned in *Kirschbaum, supra*, pp. 8, 9) intended to limit the coverage of the Act as finally enacted. The answer to this question, as the legislative history shows, is that the only limitation apparently intended was to exclude *in-trastate* activities whose coverage would depend solely on the doctrine of the *Shreveport* case; for at the same time, significantly, Congress resolved the differences and uncertainties in other provisions of the earlier bills which might have left in doubt the purpose to cover "each" and "any" *employee* "engaged in com-

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' After listing the Supreme Court holdings on commerce questions, he continued (*id.*, p. 4):

It will be observed that these theories of the interstate commerce power, as laid down by the Court, are complicated and overlapping and that some could be directly and automatically applied while others could be applied only where circumstances were found to warrant. It was therefore inevitable that any bill which tried to use these available weapons to fortify itself against the constitutional attack which labor and commerce legislation always faces, should to a considerable extent sacrifice simplicity. For neither the subject-matter of the bill nor the legal theories underlying it can with practical safety be reduced to any one simple formula.



merce or in the production of goods for commerce" (see Sections 6 and 7 of the Act). In short, while Congress undeniably abandoned the original specific provision covering "even local" intrastate production on the basis of the *Shreveport* doctrine, it was careful to remove any doubt of the Congressional intent to extend the Act's coverage—in terms of "substantial universality" (see *Powell, supra*, 339 U. S. at 516-517) and "throughout the farthest reaches of the channels of interstate commerce" (see *Jacksonville Paper, supra*, 317 U. S. at 567)—to each individual *employee* "engaged in commerce or in the production of goods for commerce", to the full extent of the broad statutory definitions of those terms (unless specifically exempted). This is made clear by a comparison of the differences in the bills which originally passed the Senate and the House, respectively, with the final conference bill which was enacted into law substantially unchanged, and is corroborated by the legislative hearings and debates.

2. Consideration of the coverage provisions of the bill as originally introduced (S. 2475 and H. R. 7200, introduced May 24, 1937) is particularly pertinent, because the coverage language of the final Act followed (in more expanded form, except for deletion of the specific provision based on the *Shreveport* doctrine, see *infra*, pp. 18, 22-23) one of that bill's alternative "hopeful approaches to constitutionality, each complete in itself," i. e. Part III, which was entitled "Unfair Goods Barred from Interstate Commerce." Part III consisted of Sections 7 and 8. Section 7 (c) provided coverage for "any *employee* engaged in interstate

commerce or in the production of goods intended for transportation or sale" (emphasis added) in interstate commerce, and these terms were broadly defined in the definition section of the bill.<sup>8</sup> In addition, Section 8 provided coverage for "employees of an employer or class of employers *not* engaged in the sale or shipment of goods in interstate commerce or in the production of goods for sale or shipment in interstate commerce" (emphasis added), where it was administratively determined that the effect of any substandard labor condition gave such employers "an unfair competitive advantage over employers engaged in interstate commerce or in the production of goods for sale or shipment in interstate commerce" (Sec. 8). The latter provision was expressly designed "to take advantage of the doctrine that even local matters may be regulated where they have the effect of introducing any unfair competition with interstate commerce," "under the *Shreveport case* and the *New York Central case*"<sup>9</sup> (see *Joint Hearings, supra*, pp. 50-51, 59).<sup>10</sup>

<sup>8</sup> Section 2 (a) (2), (21) and (24). The definition of "interstate commerce" was virtually identical to the one in the Act as enacted. The definitions of "goods" and "produced" were subsequently broadened (see *infra*, p. 22).

<sup>9</sup> *Houston & Texas Ry. v. United States*, 234 U. S. 342; *Wisconsin Railroad Comm'n v. Chicago, B. & Q. RR. Co.*, 257 U. S. 563.

<sup>10</sup> The assertions made by the sponsors that this comprehensive bill did not attempt to cover "purely local pursuits or intrastate service trades" clearly implied no intent to limit the full scope of its broad coverage terms, but were simply disclaimers of the charge that the bill went as far as the National Industrial Recovery Act and exceeded the constitu-

The intent to exercise the full constitutional limits of the language used in each of the sections of this bill was clearly brought out in the Joint Hearings. It was explicitly stated that there was "some overlapping" in the bill's provisions because the effort was to take advantage of all precedents that might support

tional power. See, *e. g.*, Senator Black's statement, "Now notice how different this bill is from the N. R. A. First. It applies only to interstate industries and those local industries which substantially and materially compete with interstate industries. It leaves the entirely local employer and the small employer alone" (81 Cong. Rec., 75th Cong., 1st Sess., Pt. 10, p. 1480). See also the statement of Senator McGill where, after describing the provisions of Part IV of the bill which provided "an alternative legal basis for regulation since they are based upon the theory that substandard labor conditions which directly affect interstate commerce may be controlled by Congress," he concluded:

While the bill closes the channels of interstate commerce to goods produced under unfair labor conditions, the bill does not attempt to cover purely local pursuits or intrastate service trades [*id.*, pp. 1504-1505].

That the sponsors were not suggesting any limitation on the scope of the language of Part III with respect to "any employee engaged in interstate commerce or in the production of goods intended for transportation" in interstate commerce was clearly brought out during the Joint Hearings on the bill, and is corroborated by the subsequent adoption of express exemptions deemed necessary in order to exclude "retailers" and "service trades, such as the filling-station attendant, and the pants presser" and the "local merchant" who, because of his location near a State line, might be delivering goods across the line. In stating that "[i]t was not intended by this bill to apply generally to retailers or to apply to the service trades \* \* \* and small business generally," Assistant Attorney General Jackson explained that "disregarding that exemption" (the bill then contained a provision exempting businesses employing less than a fixed number of employees), this bill "as it now stands"



each of them (*supra*, pp. 10-11), and that the bill incorporated the constitutional theories of decisions construing a wide variety of federal regulatory statutes, including decisions under the Sherman Act, the Mann Act, the Fugitive Felon Act and the "diseased cattle" statute (see Joint Hearings, pp. 2-4, 17, 58-60; cf. the assertions by respondents, Br., pp. 27-28, and *amicus curiae*, Br., p. 40, that these decisions are wholly

would apply to "the retailer who is located close to a State line and sold his goods by delivery across a State line" and to "a local retailer, who by his labor practices and standards was able to affect the interstate movement of goods" (Joint Hearings, *supra*, pp. 35-36). The bill at that time did not have either the "local retailing capacity" or the "retail establishment" exemptions which it was deemed necessary to provide in subsequent bills and in the Act as enacted. The original bill was amended before it was reported to the Senate so as to expressly exclude, *inter alia*, persons employed in a "local retailing capacity" from the definition of "employee" (S. Rept. No. 884, 75th Cong., 1st Sess., p. 6). It was in this context that the committee report accompanying the bill (as thus amended) stated:

The bill carefully excludes from its scope business in the several States that is of a purely local nature. It applies only to the industrial and business activities of the Nation *insofar as they utilize the channels of interstate commerce*, or seriously and substantially burden or harass such commerce. \* \* \* For example, the policy in this regard is such that it is not even intended to include in its scope those purely local and small business establishments that happen to lie near State lines, and solely on account of such location, actually serve a wholly local community trade within two States [*id.*, p. 5, emphasis added].

The "retail establishment" exemption contained in Section 13 (a) (2) of the Act, as enacted, was added to make clear that "retailers located near the state lines" as well as "a retailer purchasing goods from without the state" would be exempt (see *Walling v. Jacksonville Paper Co.*, 317 U. S. 564 at 571).

irrelevant),<sup>11</sup> as well as more recent decisions under the Wagner Act (Hearings, p. 59).

The specific language of Section 7 (c) of the original bill (which, as we have pointed out, was the source of the coverage language of the Act as enacted) was explicitly premised on the broad principles that "conditions of employment of workers immediately engaged in interstate commerce, may be regulated by Federal law" and that "regulation of employment conditions among workers engaged in producing goods intended to be shipped in interstate commerce is merely a device designed to make effective at an early stage the prohibition against the interstate shipment"; the decisions invoked include the *Wilson v. New, Virginian Railway*, *Washington Coach Co. v. Labor*

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<sup>11</sup> Assistant Attorney General Jackson pointed out that "the court has held that \* \* \* diseased plants, diseased animals, or disease-bearing textiles could certainly be forbidden to enter the channels of interstate commerce" (Joint Hearings, p. 17). And he summarized the "long established precedents" supporting Section 7 of the proposed bill by quoting the following from *Ky. Whip & Collar Co. v. Ill. Central R. Co.*, 290 U. S. 334, 346:

The power to prohibit interstate transportation has been upheld by this Court in relation to diseased livestock, lottery tickets, commodities owned by the interstate carrier transporting them, except such as may be required in the conduct of its business as a common carrier, adulterated and misbranded articles, under the Pure Food and Drugs Act, women for immoral purposes, intoxicating liquors, diseased plants, stolen motor vehicles, and kidnaped persons. [See Joint Hearings, p. 4; see also pp. 58-59].

See also this Court's recognition of the pertinence of such decisions to the coverage terms of this Act. *United States v. Darby*, 312 U. S. 100, 113-114, 122, 124; *Powell, supra*, 330 U. S. at 512.

*Bd., Stafford v. Wallace and Coronado Coal Company cases* " (Joint Hearings, p. 59).

3. The bill as passed by the Senate on July 31, 1937 (81 Cong. Rec. 7957), while dropping the specific provision based on the *Shreveport* doctrine, retained the original bill's basic coverage language of Section 7, *supra*, pp. 12-13, together with the broad definition of "commerce"; the Senate bill also broadened the original definitions of "produced" and "goods." In contrast to the bill which was later passed by the House on May 24, 1938 (83 Cong. Rec. 7449), the Senate bill thus rested coverage upon the nature of the individual *employee's* activities. The House bill made coverage dependent exclusively upon the character of the employer's business. (H. Rept. No. 2182, 75th Cong., 3d Sess.), its coverage applying to "[e]very *employer* engaged in commerce in any industry affecting commerce" (Sections 4 and 5; emphasis added).

Although superficially it might appear that the "affecting commerce" language of this House bill provided a broader coverage than the Senate bill, its actual coverage was substantially narrower. See *Mabee v. White Plains Pub. Co.*, 327 U. S. 178, at 182, n. 4. Not only was its applicability limited to an "employer engaged in commerce"—defined to mean "an employer in commerce, or an employer engaged, in the ordinary course of business, in purchasing or selling goods in commerce" (Sec. 3 (k))—but its

<sup>12</sup> *Wilson v. New*, 243 U. S. 332; *Virginian Railroad Co. v. Federation*, 300 U. S. 515; *Washington Coach Co. v. Labor Bd.*, 301 U. S. 142; *Stafford v. Wallace*, 258 U. S. 495, 520; *Coronado Coal Co. v. U. M. Workers*, 268 U. S. 295.



application depended upon the additional administrative finding, after hearings, that the employer was engaged in an "industry affecting commerce," which, in turn, depended upon meeting prescribed standards of substantial relationship to interstate commerce (Sec. 6).<sup>13</sup> Its coverage was further limited by the provision for judicial review of the administrative declaration that an industry was "an industry affecting commerce" (Sec. 8). Since this House bill omitted all reference to "production of goods" and covered only the employer "engaged in commerce" even if his industry was found to be one "affecting commerce," it seems clear that it did not by the mere use of the "affecting" language provide any broader (if as broad) coverage than the "production" coverage of the Senate bill or the Act as finally enacted.

4. The conflict between the Senate bill's "employee" test of coverage and the House bill's "employer" test, as this Court has repeatedly recognized, was deliberately resolved in conference in favor of the Senate version.<sup>14</sup> (H. Rept. No. 2738, 75th Cong., 3d Sess., pp. 29, 30). The "affecting commerce" language of the House bill was thus dropped in the context of dropping the "employer" test. The "affecting commerce" language had never appeared in any draft bill as a term describing or modifying the *employee's* ac-

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<sup>13</sup> The standards prescribed were "(a) that the activities of such industry are Nation-wide in their scope, or (b) that such industry is dependent for its existence upon substantial purchases or sales of goods in commerce and upon transportation in commerce, or (c) that the relation of such industry to commerce is in other respects close and substantial \* \* \*."

<sup>14</sup> See the *Kirschbaum, Jacksonville Paper* and *Overstreet* decisions, discussed in petitioner's main brief, p. 25.

tivities, and therefore its deletion implied no restriction of the coverage of the Senate bill (which was phrased in terms of the employee's activities, *supra*, p. 17). There was no occasion to use the "affecting commerce" language in order to extend the full scope of coverage to "each" and "any" employee "who is engaged in commerce or in the production of goods for commerce," as those terms were broadly defined in the conference bill. The Congressional intent to exercise its commerce power to the farthest limits of this language is clearly evident, as this Court has stated, from the Act's declaration of its "purposes in bold and sweeping terms" and the statement of its scope "in terms of substantial universality," as well as from its "specificity in stating exemptions" (see *Powell, supra*, 339 U. S. at 516-517). The final bill achieved as comprehensive coverage, within the coverage finally adopted, as the "affecting commerce" language of earlier bills, by making its own finding<sup>15</sup> that substandard labor conditions "in industries engaged in commerce or in the production of goods for commerce" had the detrimental effects which warranted "the exercise by Congress of its power to regulate commerce \* \* \*, to correct and as rapidly as practicable to eliminate the conditions \* \* \*" (Section 2), and then making the Act automatically applicable to "any" and "each" employee so engaged.

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<sup>15</sup> See *United States v. Darby*, 312 U. S. 100, upholding the constitutionality of the "production" provisions of the Act on the ground of the power of Congress to "regulate intrastate activities where they have a substantial effect on interstate commerce" (*id.*, at 119) and pointing out that "sometimes Congress itself has said that a particular activity affects the commerce, as it did in the present Act \* \* \*" (*id.*, at 120).

That the deletion of the "affecting commerce" language was not intended to restrict the scope of the language finally adopted is further corroborated by the fact that the Congressional debates on the conference bill were obviously premised on the assumption that its terms invoked the limits of the constitutional power; the debates were concerned solely with the extent of the constitutional power in view of the then unsettled and conflicting concepts of its scope. For example, Senator Borah, one of the Senate Managers on the conference committee, who was obviously speaking of "those engaged in interstate commerce" in the generic sense in his answers to charges made by Senators Bailey and Glass that the statutory language exceeded constitutional limits, summed up his view of the intended scope of the language as follows:

\* \* \* We are laying down the general principle that Congress may regulate the minimum wage of those engaged in commerce. If we should fail to establish that fact under the law, of course the case would fail; but all we are seeking to do in this bill, so far as that question is concerned, is to protect the minimum wage of those who are engaged in interstate commerce. It may be said that a particular individual is not in interstate commerce. If he is not, then he is not covered by the bill; but, if he is, he is covered by the bill [83 Cong. Rec., 75th Cong., 3d Sess., Part 8, pp. 9168-69].

There has not been a more full, complete, and accurate definition of interstate commerce than was written by John Marshall in the *Gibbons* case, and we have not undertaken in this bill,



at least we thought we were not undertaking to go outside the definition announced nearly 150 years ago. What we intended to do was to deal alone on the question of minimum wages with the men who are engaged in interstate commerce. If we have been unfortunate in our language, that is one thing, but our intention and our sole purpose was to deal with those engaged in interstate commerce. In my opinion the language carries out that idea. I may be mistaken as to that, but I am not mistaken as to what our intention was, because we discussed it off and on for 9 long days [*id.*, p. 9172].<sup>18</sup>

<sup>18</sup> At a later point, Senator Borah again explained:

"Mr. President, a brief word as to what we undertook to do. The Senator [Mr. Bailey] has argued that certain people working in certain conditions under certain circumstances in certain places would not be engaged in interstate commerce. That may be true. In many instances referred to that would be true. But if the Court so holds, then such a worker would not be covered by the bill. All we have undertaken to say is that those engaged in interstate commerce shall pay a minimum wage of 25 and 30 cents an hour for the first and second years. We have gone no further than to announce the general principle as to those engaged in interstate commerce and if the court finds, as it must find, pro or con upon the question, the particular case must fall or rise according to whether the Court finds the parties are engaged in interstate commerce. But we have not extended the rule by the terms of the measure itself. We have said that those employed in interstate commerce are to be covered. The Court must determine whether or not they are employed in interstate commerce. If they are employed in interstate commerce then they are protected by the bill and covered by the bill. We could not do other than lay down a general principle and announce the general principle of protecting those engaged in interstate commerce. There is one phrase which seems to me objectionable, but under the Jones-Laughlin

It is likewise significant that, insofar as the Act as enacted differed from the coverage provisions of the original bill (*supra*, pp. 12-16), its coverage was in fact expanded in several substantial respects—apart from the deletion of the provisions covering intrastate producers under the *Shreveport* doctrine. For example, the “limiting language” on “production of goods intended for transportation or sale in” commerce was omitted and the broader phrase “production of goods for commerce” substituted (see *Alstate Construction Co. v. Durkin*, 345 U. S. 13 at 15, emphasis added). In addition, the basic minimum standards were made self-executing, the original bill’s requirement of an administrative order before the statutory standards became operative on any employment being abandoned. And broadened definitions of “goods” (to include “subjects of commerce of any character”) and of “produced” (to include the language “in any process or occupation necessary to the production”) were adopted.”

In net result, therefore, the Act as enacted (apart from the deletion of the specific section based on the *Shreveport* doctrine) provided a broader scope of coverage than any of the preceding bills. For, what

decision it was thought by the conferees it was justified” (*id.*, p. 9175). (The particular phrase referred to is nowhere identified.)

” The broadened definitions were also in the bill passed by the Senate.

This definition of “produced” was subsequently amended by the Fair Labor Standards Amendments of 1949 (63 Stat. 910, 911; 29 U. S. C. 203 (j)) to substitute the language “closely related” and “directly essential” for the word “necessary.”

the conference committee decided to do was to abandon the procedure provided in all previous bills which would have made coverage dependent upon administrative findings of "substantial" or "direct" effects on commerce, or which would have allowed broad administrative discretion to grant exemptions (see, *e. g.*, Sections 4, 6 and 8 of the original bill S. 2475 and as passed by the Senate; and Sections 6 and 8 of the bill as passed by the House). Instead, Congress decided to substitute its own findings to serve as a basis for widespread, self-executing, application of the minimum standards, subject only to the exemptions stated with detailed specificity in the statute itself. It is evident that the conference committee deliberately concluded to go to the limits of its constitutional power with respect to employees engaged "in" interstate commerce or in the "production of goods for [interstate] commerce," leaving it to the Court to resolve *ad hoc* the differing views as to what particular activities fell within those constitutional limits.

Respectfully submitted.

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OCTOBER 1958.



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**No. 37**

**IN THE**  
**Supreme Court of the United States**  
**OCTOBER TERM, 1958**

**JAMES P. MITCHELL, Secretary of Labor,**  
**United States Department of Labor,**  
***Petitioner***

**v.**

**LUBLIN, McGAUGHY & ASSOCIATES, Et AL,**  
***Respondents***

**RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR**  
**A WRIT OF CERTIORARI TO THE UNITED STATES COURT**  
**OF APPEALS FOR THE FOURTH CIRCUIT**

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1957

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**No. 802**

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**JAMES P. MITCHELL**, Secretary of Labor,  
United States Department of Labor,  
*Petitioner*

V.

**LUBLIN, McGAUGHY & ASSOCIATES, ET AL**,  
*Respondents*

---

**RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR  
A WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE FOURTH CIRCUIT**

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**REASONS FOR DENYING A WRIT OF CERTIORARI**

This is a case in which the Department of Labor and its counsel have tacitly admitted that they are attempting to extend the reaches of the Fair Labor Standards Act into what is virgin territory. If certiorari is granted and the decisions of the District Court and the Court of Appeals are reversed, it is highly probable that no local business establishment will be excluded from the provisions of the Act; it is certain that no profession, no matter how local in nature, will be *dehors* the provisions of the Act.



(1) The first and foremost reason advanced by the Petitioner for obtaining this writ is an alleged conflict between the decision here of the Fourth Circuit and the decision of the Eighth Circuit in *Mitchell v. Brown Engineering Co.*, 224 F. (2d) 359. Petitioner steadfastly refuses to recognize the obvious distinction between these cases as disclosed by a cursory reading of the opinion and as pointed out by the District Court below as follows (R. 7a and 8a)\*: "The Eighth Circuit pointedly suggested that the activities of a 'resident engineer' on a job involving repairs to an interstate highway was one factor aiding the Court in its conclusion. In the instant case any employee performing similar duties would be exempt as a 'professional' employee and hence not within the Act. In fact, the gist of the determination by the Eighth Circuit lies in this brief comment:

"In this case the activity of defendant's employees was in connection with the repair, alteration, and improvement of existing instrumentalities of interstate commerce. Their duties, beyond the preparation of plans and specifications for a proposed construction project, required their presence at the job site as 'resident engineer'."

The Eighth Circuit opinion continues at great length to analyze in minutest detail the duties and activities of the *resident engineer* and his direct control of the work being performed under his constant jobsite supervision. Before quoting the contract itself, the

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\* Page numbers followed by lower case letters refer to that part of the record printed in Petitioner's appendix for use of the Court of Appeals; capital letters followed by page numbers refer to that part of the record in Respondents' Appendix bound with their brief printed for use of the Court of Appeals. The letter "P" followed by page numbers refers to the petition for a writ of certiorari.

Court, on page 364, said: "The inference is fairly deducible that the work of the 'resident engineer' was a vital factor in affecting the progress of the construction project."

In the instant case there is an utter absence of evidence that Lublin, McGaughy & Associates performed any services on an existing instrumentality of commerce or engaged in any construction work by detailing a sub-professional employee to act as a resident supervisor. To the contrary, the record conclusively demonstrates that the respondents do *not* operate in this manner; they furnish no supervision whatever on any government work. (R. A-23, A-24, A-25). On other work, if these Respondents furnish supervision, it usually consists of one weekly visit to the jobsite, for one hour or so, by a qualified registered engineer or architect who is, more often than not, a partner or associate, and obviously exempt from the Act. And so, even though the opinion of the Fourth Circuit commented upon an apparent oversight of the Eighth Circuit in the *Brown* case, it certainly did not "recognize the conflict" as Petitioner alleges (P. 13).

(2) Secondly, Petitioner contends that the opinion of the Court of Appeals in the instant case is at variance with other opinions of still other circuits. Petitioner has cited many cases in each of the courts below dealing with employee-draftsmen and technicians of large national construction firms where such employees were held to be under the Act. He completely ignores what the Court of Appeals here said in its opinion; namely, "(t)here is, however, no clean-cut holding that the work of employees of independent architects, such as are before us in this case is 'commerce' under the Act." (P. App. A 41).

(3) In the third numbered reason advanced by Petitioner for the issuance of a writ, we find two unconnected discourses:

Discourse (a) deals with the alleged error of the courts below in finding the nature of the work of the Respondents purely local in character. It is respectfully submitted that an architectural and engineering firm could hardly be more local in character than the one involved here, unless the mere existence of a Washington branch office changes its category. Both offices attend to purely local business and although they write letters out of the state and have clients who transmit plans out of the state, it can be truly said that so does every other engineer and architect in America who practices his profession with even moderate success.

The admitted exclusion of employees of local architects, acknowledged in the Labor Department's own Interpretative Bulletin and based on a House Committee report, can only stem from the obvious remoteness from commerce of the individual employee's work. Except for survey parties gathering preliminary data for plans, Respondents' other employees virtually never even see the jobsite, if indeed the structure being planned is ever erected. The job-list (R. 18a-29a) and other parts of the record make it obvious that many, many projects never get beyond the drafting boards. Some are abandoned for financial reasons; others are only intended as preliminary studies or "advance planning" for possible future development. This is a far cry from the work of construction engineering employees, stationed at or near a jobsite and participating daily in the actual progress of construction.

Discourse (b) deals with the allegation that plans and specifications are "goods" within the meaning of



the Act. This matter has been completely and definitely disposed of by the Court of Appeals below which devoted the first half of its opinion to this point. (P. App. A 34-38 incl.) Petitioner cannot and did not produce a single case in any court from any jurisdiction in which it has been held that plans or specifications are "goods". Both courts in which this case has been heard have readily distinguished this case from *Western Union v. Lenroot*, 323 U. S. 490, and *Powell v. U. S. Cartridge Co.*, 339 U. S. 497, but Petitioner doggedly refuses to recognize the obvious distinctions.

Relying largely on the *Lenroot* and *Powell* cases, Petitioner has unsuccessfully argued that plans and specifications are goods in the following tribunals:

*McComb v. Turpin*, 81 F. Supp. 86 (D. C., Md.)  
*Collins v. Ford, Bacon & Davis*, 71 F. Supp. 229  
(D. C., Pa.)

*Mitchell v. Brown Eng. Co.*, 27 Labor Cases #68,  
814 (D. C., Iowa, 1954)

*Mitchell v. Brown Eng. Co.*, 224 F. (2d) 359,  
(C.A.-8)\*

*Mitchell v. Lublin, et al*, 13 W.H. Cases 211,  
(D. C., Va.)

*Mitchell v. Lublin, et al*, 250 F. (2d) 253 (C.A.-4)

Of the ten jurists to whom the issue has been thus expressly presented over the past ten years, not one has been willing to decide that plans and specifications are goods! The reason is plain enough: By no stretch of the judicial imagination can these two cases cited by Petitioner be said to stand for that untenable proposition.

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\* Finding coverage under the "in commerce" section, on the basis of the activities of the "resident engineer", the Eighth Circuit expressly declined to opine whether plans and specifications are goods (p. 365).

(4) The reason next assigned for granting the writ attempts to explain that Petitioner's own Interpretative Bulletin, in which it is stated that employees of a local architectural firm are not to be included for coverage, should not apply to the Respondents, because of their "multi-state practice", and their "extensive engineering operations". (P. 23).

The Court is reminded that throughout these proceedings the Department of Labor has relied entirely upon mere nomenclature to characterize the operations of Respondents as interstate in character. The record does not give substance to the contention. The nature of this professional firm's work is just about as local as the work of any such firm with four partners could be. Moreover, as this Court has repeatedly stated, it is the work of the individual employee that counts. There is nothing in this record to suggest that Respondents' sub-professional employees are any differently occupied than similar employees of other local architects and engineers.

(5) The final reason advanced by Petitioner for the granting of the writ seems to be based upon some statistics of a magazine entitled *Consulting Engineer*. Petitioner states the said publication discloses that there are "thousands of non-professional employees in this field". (P. 25). The magazine further declares, according to the Petitioner, "that most of the firms in this field do not limit their operations to any one state". (P. 26).

It is respectfully suggested that the facts and figures from the said magazine have nothing whatsoever to do with the principles involved here, unless the Petitioner is contending by innuendo that Congress

erred in exempting the engineering profession from coverage by the Act.

In addition, it is difficult to see how the material from an ordinary journal can be employed in a petition for a writ as is here requested. It was never included in any of the evidence or argument at either of the former trials and appears here for the first time, without any basis or foundation being established for its authenticity or legitimacy. In any event, it would seem quite irrelevant.

### CONCLUSION

There is no conflict of circuits here to be resolved; no principles that threaten the foundation of the Fair Labor Standards Act; no lower court decision that does violence to any prior rulings of this Court. The simple admitted fact is that the Department of Labor is trying to expand the legal meaning of the word "goods" and, in addition, is trying to invade the periphery of the professions which are exempt by statute from the provisions of the Act.

We assert with confidence that Congress did not intend to cover the sub-professional employees of professional architects and engineers. As expressed by Judge Chestnut in *McComb v. Turpin*, 81 F. Supp. 86, this was not "the mischief to be remedied by the Act . . . .". In this respect, it is highly significant that none of the three cases involving independent architects and engineers (*McComb v. Turpin*, supra; *Mitchell v. Brown Eng. Co.*, supra; and the case at bar) was instituted by the defendants' employees; each was instituted by the Department of Labor.



We believe that what Petitioner is attempting should be done by the Congress, if it is to be done at all, and not by an administrative agency or a judicial body. We respectfully urge that the petition for a writ of certiorari be denied.

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ALAN J. HOFHEIMER

*Attorneys for Respondents*

March, 1958

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**SEP 23 1958**

**JAMES R. BROWNING, Clerk**

**RECORD No. 37**

**IN THE**  
**Supreme Court of the United States**  
**OCTOBER TERM, 1958**

**JAMES P. MITCHELL, Secretary of Labor,**  
**United States Department of Labor,**  
***Petitioner***

**v.**

**LUBLIN, McGAUGHY AND ASSOCIATES,**  
**et al.,**  
***Respondents***

**BRIEF FOR RESPONDENTS**

**On Writ of Certiorari to the United States Court**  
**of Appeals for the Fourth Circuit**

**ALAN J. HOFHEIMER**  
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**BRIEF FOR RESPONDENTS**

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On Writ of Certiorari to the United States Court  
of Appeals for the Fourth Circuit

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**STATEMENT OF THE CASE**

The issue in this case is whether sub-professional employees of a firm of architects and consulting engineers are engaged (a) in commerce, or (b) in the production of goods for commerce, within the meaning of the Fair Labor Standards Act, as amended.

Unless said employees were so engaged during the period of time covered by the complaint filed by the petitioner (R. 121a et seq.), the District Judge has correctly dismissed the complaint and refused to enjoin certain alleged violations, and the United States Court of Appeals for the Fourth Circuit has correctly affirmed the trial court's decision.

The burden of proof is upon the petitioner.

### **PARTICULAR QUESTIONS INVOLVED**

#### **A. "ENGAGED IN COMMERCE?"**

1. Are stenographic and clerical employees of a Virginia firm of exempt licensed professional men, in this case architects and engineers (but doctors or lawyers would be equally apposite), engaged in commerce within the Act? Where such employees' duties are substantially no different from the duties performed by stenographic and clerical employees in any medium-sized professional firm, is the answer to the previous question altered by the fact that a Virginia firm maintains a branch office in Washington, D. C., and has been associated with foreign nationals in certain overseas architectural and engineering contracts undertaken for the U. S. Government?

2. Are field men whose work is located in Maryland engaged in commerce because they cross the District of Columbia line on their way to work, and again in returning from work?

3. Are draftsmen engaged in commerce because reproductions of drawings on which they worked are sometimes subsequently transmitted across state lines by others?



**B. "ENGAGED IN THE PRODUCTION OF GOODS FOR COMMERCE?"**

Are the plans and specifications for a particular construction project, drawn for a specific client, "goods" within the meaning of the Act, so that draftsmen and other sub-professionals aiding an exempt professional group in the preparation of such plans and specifications can be said to be engaged in the production of goods for commerce?

**QUESTION IMPROPERLY FRAMED IN PETITIONER'S BRIEF**

Under the pretext of setting forth the question presented, the petitioner's brief (page 2) *states as a fact* that respondents' "non-professional employees . . . work on the plans and specifications for projects for improvement of interstate instrumentalities or facilities . . .". Far from being a fact, this is an *issue*.<sup>\*</sup> The question is, first, whether the employees *are* engaged in such activities, and secondly, if so engaged, whether directly or remotely. Moreover, it is an issue which both courts below have resolved in respondents' favor, contrary to the implications of petitioner's "question presented".

Respondents emphatically deny that any of their employees, during the period covered by the complaint, have worked "on the plans and specifications for projects for improvement of interstate instrumentalities or facilities," within the meaning of the Fair Labor Standards Act, or otherwise.

Also on page 2 of petitioner's brief is the wholly unwarranted implication that respondents' non-professional employees play some role in regularly trans-

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<sup>\*</sup> See Stip. No. 4, R. 11a.

mitting drawings, plans and specifications across state lines. All parties concede that it is the activity of the employee that governs coverage, and the record is bereft of evidence that the "regular duties" of respondents' employees include any of the activities described as *fact* in petitioner's framing of the "question presented."

## STATEMENT OF THE FACTS

### A. CONCERNING PETITIONER'S PRESENTATION

In his zeal to prevail in what would become a landmark case, involving employees of all professional firms of every kind, the petitioner has consistently in all three courts grossly overstated the facts relating to the so-called "interstate" and "multi-state" character of respondents' business. By constant repetition of the catch-words and phraseology of interstate commerce, and by doggedly applying interstate nomenclature to respondents' operations, petitioner obscures the essential nature of the employees' daily routine activities. For example:

1. It is stated on pages 2 and 4 of petitioner's brief that respondents' business relates essentially to "industrial" projects. Of the 263 projects undertaken by respondents (R. 18a-29a, incl.), only four\* could conceivably be called "industrial". Of these four, number 898 can be eliminated, since the project designed by respondents was abandoned by the client, and will never be constructed (R. 132a). The remaining three projects, constituting approximately 1% of the projects undertaken, are of such trivial nature that they merit no consideration. Moreover, the evidence utterly fails to dis-

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\* Job Nos. 805, 898 (including 898-1), 954 and 968.

close whether they constitute new construction which is not covered by Fair Labor Standards Act, and whether they involve interstate commerce in any way whatsoever. In any event, petitioner's brief would be much more accurate by saying respondents' practice is essentially nonindustrial.

2. Petitioner's brief proceeds on the assumption that military projects, concededly an important segment of respondents' business, may be equated with interstate commerce. Obviously, the converse is true. Except where the contrary be expressly shown by the evidence, military installations must be assumed to be instrumentalities of war, and *not* of commerce. For example, it is solemnly stipulated between petitioner and respondents (Stip. No. 12, R. 16a) that the Naval Air Station installation at Oceana, Virginia, is "a Naval jet air base, part of the East Coast defense system for intercepting enemy aircraft." The record contains not even a scintilla of evidence that this *new* and still incomplete instrumentality of war is even remotely associated with interstate commerce. Yet respondents must submit to repeated references in petitioner's brief to "airfields", "airplane facilities", "hangars", "military bases", etc.

3. In the muddled mixture of references to respondents' non-military projects, the vast majority of which are accomplished in the Norfolk office for Virginia clients and involving Virginia construction, the application of the "new construction" doctrine is glossed over as though this Court had never existed. This well known doctrine, discussed here as recently as 1954 in *Mitchell v. Vollmer*, 349 U. S. 427, has apparently been overruled or overlooked by petitioner in favor of his "liberal construction" doctrine. While petitioner



pleads at least three times in his brief for a "liberal construction", he never once alludes to the "new construction" doctrine, by virtue of which the greater part of every architect's work is placed beyond the coverage of the Act.

4. It was expressly conceded by petitioner's counsel in the trial court (R. 35a) that the transportation of plans and specifications across state lines, so often referred to in petitioner's brief, is accomplished almost exclusively by the Army and Navy in connection with military projects, not by respondents and their employees. With respect to non-military projects, uncontradicted testimony of respondent John B. McGaughy demonstrates that only about 2% of the bidders on private projects are from out-of-state (R. 61a, 62a). Indeed, in a number of private projects, the contracts are let without solicitation of bids (ibid). Since private projects constitute only 40% of the work of the Norfolk office and 15% of the work of the Washington office, it would appear that less than 6/10 of one per cent of the completed plans and specifications prepared by respondents' employees are actually transported across state lines by or for respondents.

5. Petitioner's brief attempts to portray a picture of drawings and other architectural and engineering documents streaming back and forth between Washington and Norfolk. Petitioner's brief overlooks the following testimony elicited by his own counsel upon direct examination: "As a general rule, the work in the Washington area is done by the Washington office. That is the basic concept of the organization. Whereas, the work in the Norfolk area is done by the Norfolk office. We tried to follow that wherever possible. There

are exceptions" (R. 69a). This is a candid, succinct and logical picture of respondents' operation which petitioner attempts to inflate and distort into a gigantic "multi-state" industrial enterprise.

6. Respondents are long-time residents of Norfolk, Virginia, and each resides there with his family. Prior to the formation of the partnership, Mr. Lublin practiced architecture in Norfolk and Mr. Marshall was employed by him. Similarly, Mr. McGaughy practiced engineering in Norfolk and Mr. McMillan was employed by him. The present firm emerged when Messrs. Lublin and McGaughy became associated as partners and brought into the firm their respective said employees as junior partners. The true size of respondents' firm and scope of their business, while gratifying to them as a reflection of their recognized professional ability, is modest in comparison with the proportions outlined by petitioner's brief.

7. The inferences attempted to be drawn by petitioner from the job-list furnished by respondents in no way convey an accurate picture of respondents' activities. In the two year period covered by the complaint, not more than 8 of 263 projects were related to construction proposed for erection in the State of Maryland. The record shows that only the Washington Suburban Sanitation project was of major consequence; that none of the eight Maryland projects involved interstate commerce, and several of them were never built. Similarly, the amount of work done on projects to be erected in North Carolina and other states outside Virginia is negligible. It may be conservatively estimated that, except for the aforesaid suburban sewer

work, associated with local residential construction, 95% of respondents' activities concerned Virginia projects.

8. The appendix contained on pages 52 *et seq.* of petitioner's brief is a lamentable effort to confuse this Court by offering in massive form a list of allegedly "interstate" projects which, taken individually, can be absolutely demonstrated to contain no elements requiring coverage of respondents' employees under the Fair Labor Standards Act. We draw little solace from the fact that petitioner has finally abandoned his contention below concerning respondents' work on Old Cape Henry Light House, an historic shrine which was retired from service 40 years ago. The list primarily contains military projects for which the record contains not the slightest evidence of interstate commerce. The turnpike projects listed there have long since and notoriously been abandoned by the public authorities concerned with them, and, had they been built, would have constituted new construction of brand new road systems. Mere mention of the Oceana Radio Station is not evidence of commerce. The "Advance Planning Report" which respondents prepared for such new station does not in any court of law constitute engagement in commerce by the respondents' employees who may have worked on it. How much more remote can one get from commerce than an "Advance Planning Report" prepared by independent consultants for a new facility at a new location? (R. 70a). As for television station WAVY, it had not commenced to broadcast or even yet been licensed, so new was this company when respondents undertook a small job for it! Clearly, no commerce was involved. Again, sewer and water de-



signs are mentioned in this appendix without acknowledgment of uncontroverted evidence showing the purely residential character of the work.\* A brand new bus terminal can hardly constitute repair, enlargement or extension, and the "small remodeling job" done on another terminal "five or six years ago" is not covered by the complaint filed by the petitioner. The survey of certain buildings at the Norfolk Naval Shipyard was made by a professional engineer, exempt from the Act, to indicate what repairs were recommended. In none of these projects do respondents or their employees engage in any construction, repairs or site supervision, so that even if the latter activities were held to constitute commerce, respondents' employees' activities are far too remote therefrom to make them a part of such commerce.

9. Petitioner's brief refers to "interstate travel" of respondents' employees. The only evidence of such travel by sub-professional employees involves the field party engaged in the Washington Suburban Sanitation work, which was purely local and residential in nature. The duties of these employees were performed entirely in and around Hyattsville, Maryland, where data was collected for the new designs. They travelled from Washington to Maryland only for their personal convenience in obtaining transportation to the jobsite, and not for the convenience or at the direction of respondents (R. 135a).

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\* R. 136a. Testimony of John B. McGaughy:

Q. These are sewer designs for new housing projects?

A. That is correct; water and sewer for housing projects.

## B. THE FACTS IN PROPER PERSPECTIVE

Neither the Facts of the Case as Disclosed by the Record, nor the Law of the Cases Cited Bears Out the Conclusions Reached by the Petitioner.

By deftly lifting phrases, clauses and sentences out of context from the two opinions below, the stipulation, and the testimony of witnesses, and by interspersing these quotations with words such as "undiputed" and "undeniably", petitioner paints a picture of a vast empire of architects and engineers who practice their profession to the extremities of the earth. Nothing could be further from the truth.

Respondents are as *local* as could any professional firm be which maintains a branch office in the nation's capital and which has some foreign connections.

They are *consulting* architects and engineers, exclusively occupied in rendering professional services. In that capacity, they engage in creative design work and in counselling and advising. Plans, specifications, and correspondence are the standard media of their profession for transmitting their ideas, advices, and designs (R. 130a). They do not manufacture or construct anything. Respondents' sub-professional employees include field parties which survey land, certain of the draftsmen, and three or four stenographers. The field personnel gather data which respondents use as a basis for their designs and advices. The draftsmen reduce to graphic and descriptive form the designs and advices. The stenographers do exactly what stenographers do everywhere: write letters to parties within and without the state, take dictation, and transcribe data. Special knowledge and training is required of

virtually all the employees, and even the draftsmen, with few exceptions, are regularly engaged in creative and original work.

Norfolk field men almost never work outside of Virginia. Washington field men perform entirely in the Maryland suburbs of Washington. For the latter, the Washington office is merely a place of departure for work. The party chief has the sole responsibility of turning in the data at the office where it is recorded by a plotter (R. 5a, 134a, 135a).

Generally speaking, the Norfolk office personnel works on projects to be constructed in Virginia. Exceptions are "standard plans" and occasional work on segments of projects primarily done in the Washington office.

The work of the Washington office is largely (85%) for nearby government agencies, several of which are dealt with at offices outside the District of Columbia (R. 13a, Stip. No. 7).

The alleged interstate characteristics of respondents' profession may be summarized as follows:

*Interstate movement of personnel*—is limited exclusively to partners and associates, with the exception of Washington field men (R. 8a). The partners and associates are admittedly exempt from the Act. FLSA Sec. 13 (a) (1)\*. The work of the Washington field men, for all practical purposes, is limited to residential suburban sewer and water line location surveys in Maryland. They assemble for their own convenience at the Washington office, though only the party chief is required to do so (R. 134a, 135a).

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\* Title 29, U.S.C.A. Sec. 213 Exemptions

"(a) The provisions of sections 206 and 207 of this title shall not apply with respect to (1) any employee employed in a bona fide executive, administrative, professional, or local retailing capacity....."



*Communication and correspondence*—there is correspondence from both offices which crosses state lines. There is telephone communication between the two offices by private wire. Plans, specifications and drawings are occasionally transported across state lines from each office. Far from being the essence of respondents' business, these things are merely *incidental* thereto.

*Military projects*—some government projects may be located outside the state or district in which the respondents' work is performed. "Standard plans" for a warehouse that "have not been used to date" (R. 43a) furnish an example of this. However, there is no evidence that any government work done by respondents embraces an instrumentality of commerce (R. 9a). To the contrary, it would appear, and should be presumed in the absence of conflicting evidence, that these were instrumentalities of war, or in any event, not of commerce. On military projects, respondents render no supervision whatever (R. 15a, Stip. No. 11).

*Non-military projects*—were, with only one or two exceptions, performed in the state or district where the plans were delivered and the structure was proposed to be erected. This was virtually all new construction, in any event.

Factually, then, contrary to the oft-repeated language of petitioner, respondents' profession is not one of "interstate character in almost every aspect." The evidence undoubtedly shows, as petitioner declares on page 20 of his brief, that some drawings, specifications, and plans are transmitted across state lines, but as petitioner's attorney developed at the trial (R. 45a), almost all of this transmission was done by Army and

Navy officials with plans that had been turned over to them by respondents after the completion of respondents' services.

### **REBUTTAL**

**(1) The Preparation of Plans and Evidence of Other Work Done by Respondents' Employees Does Not Bring Them Within the Act's "In Commerce" Coverage.**

Petitioner cites seventeen cases on pages 21 and 22 of his brief in support of his position that employees of respondents are engaged in commerce. An examination of these cases shows that in every instance, the employees were engaged in the repair, improvement, or extension of existing instrumentalities of commerce. There is no evidence whatsoever in this record of a single instance where respondents or their employees have been engaged upon an existing instrumentality of commerce. *Mitchell v. Vollmer*, 349 U. S. 427, is cited no less than ten times in petitioner's brief in support of the contention that respondents' employees are engaged in commerce. In that case, Mr. Justice Douglas said:

"The test is whether the work is so directly and vitally related to the functioning of an instrumentality or facility of interstate commerce as to be, in practical effect, a part of it, rather than isolated local activity. See *McLeod v. Threlkeld*, 319 U. S. 491, 497. Repair of facilities of interstate commerce is activity 'in commerce' within the meaning of the Act, as we held in *Fitzgerald Co. v. Pedersen*, 324 U. S. 720. And we think the work

of improving existing facilities of interstate commerce, involved in the present case, falls in the same category.\*"

\* "The construction work held in *Murphy v. Reid*, 335 U. S. 865, not to be under the Act was the building of a Navy base, not the improvement of a facility or instrumentality of interstate commerce."

Unless widening streets on a naval operating base in the vicinity of the motor pool and post exchange, or extending and paving plane taxiways and parking aprons at a navy jet air base (R. 16a, Stip. No. 12) constitutes repair, improvement or extension to an existing instrumentality of commerce, then we submit that the law of *Mitchell v. Vollmer* favors the decision rendered herein by the two lower courts. Certainly the petitioner can get small comfort from either the majority or dissenting opinion of that case.

The case of *Laudadio v. White Construction Co.*, 163 F. (2d) 383, cited four times in petitioner's brief, has this to say:

"If the field were used solely to train air personnel of the Navy, it would seem to be an instrumentality of war rather than an instrumentality of commerce."

And in the case of *Divins v. Hazeltine Electronics Corp.*, 163 F. (2d) 100, the Court held that employees working on armed cargo transports were covered by the Act, while those working on warships were not working on instruments of commerce and were not covered.

This record discloses not one instance of any work of a commercial nature done by the respondents for the Navy, Army, or Air Force; wherefore, the petitioner



has failed to carry his burden of proof. Certainly the armed forces are not *per se* engaged in interstate commerce!

We submit with confidence that the statement on page 24, note 6, of petitioner's brief, to the effect that surveys show that "most of the firms in this field do not limit their operations to any one state" and that "another major source of business of such firms is highway construction", is no evidence whatever that respondents are anything other than a local architectural and engineering firm, or that its employees are engaged in commerce. Neither does reiteration of the allegation that the District Court and the Circuit Court "missed the point" prove that these courts erred in distinguishing this case from *Mitchell v. Brown Engineering Company*, 224 Fed. (2d) 359. In reversing the Iowa District Court in the *Brown* case, the Eighth Court of Appeals based its decision upon duties of the defendants and their employees as "resident engineers" on existing interstate highway repair projects. Even if that case is correctly decided, it must be distinguished from this one on the facts. In the *Brown* case, there is evidence of a major effort by Brown Engineering Co. *directly* relating to the *extension of existing interstate highway facilities* by virtue of constant, on-site, resident-engineer control of the job, i.e., actually direct participation in the construction itself, including inspection of all materials delivered to the job-site. Lublin, McGaughy & Associates have *not* engaged in such activity. Judge Hoffman, in distinguishing the *Brown* case, quotes the following language of the Eighth Circuit as being "the gist of the determination":

"In this case the activity of defendant's employees was in connection with the repair, alteration and improvement of existing instrumentalities of interstate commerce. Their duties, beyond the preparation of plans and specifications for a proposed construction project, required their presence at the job-site as 'resident engineer'." (R. 7a)

- (2) Having Stenographers Write Letters Beyond the State; Having Employees, Who Live in One State and Work in Another; Having Clients Who Advertise for Bidders Across State Lines, Do Not, of Themselves, Constitute the Employees' Engagement "In Commerce" Within the Act's Coverage.

If the mere fact that a stenographer working for a professional firm writes letters to points without the state causes her to be engaged in commerce, then there is hardly a stenographer in the land who is not engaged in commerce. Petitioner's theory on this subject was rejected in both Courts below, but is again urged here (Petitioner's Brief, p. 34). In his opinion below, Judge Hoffman said: "Stenographers and law clerks or apprentices in legal offices may ultimately come within the Act as their daily work requires them to handle correspondence, legal briefs, and other documents which are continuously being forwarded across state lines. When such a point is reached, the Act will be all-inclusive, and the employees of every business or profession will be subject to its provisions" (R. 8a).

The case of *McLeod v. Threlkeld*, 319 U. S. 491, is, we believe, still the law concerning employees who happen to have duties which may be incidental to interstate commerce. The Court held in that case that the Act covered only those employees in the *channels of*

commerce, as distinguished from those who merely *affected* that commerce. "The test under the present act, to determine whether an employee is engaged in commerce is not whether the employee's activities affect or indirectly relate to interstate commerce, but whether they are actually in or so closely related to the movement of the commerce as to be a part of it."

We submit that the evidence in this case does not meet this test. Nowhere does it appear that any of the employees for whom coverage is sought is a part of the movement of commerce between the states.

It seems to be generally accepted that the place in which an employee performs his work has nothing to do with the interstate commerce aspects of a given situation. In the case of *Bruce, et al v. J. Rich Steers, Inc., et al*, 60 F. Supp. 668, the Court said:

"... it is not the location but the nature of plaintiff's occupation which is determinative."

In *Oliphant v. Kaser* (Iowa, 1945), U. S. Dist. Ct., 10 Labor Cases, No. 68,571, the Court said that:

"Plaintiff, by signing the contract of employment, riding, dining, and sleeping at defendants' expense from Iowa to the point of work in another state, is not on account thereof 'engaged in interstate commerce' any more than one chattel being shipped from one state to another is deemed to be 'engaged in interstate commerce'."

Respondents have found no cases contradicting the foregoing interpretations of the Act, nor have any cases holding the contrary been cited by petitioner.

The evidence shows that both the Army and Navy, after completion of respondents' professional contract,



would, without help or participation from respondents, mail plans across state lines to contractors for bids. This was standard procedure. But could such activity of the military be imputed to the employees of the respondents? We think not. After the respondents have completed their assignment by turning over the plans and specifications to the District Army Engineers (R. 46a), it is utterly unreasonable to charge the respondents with interstate movement because the District Engineer sends them to contractors or Army offices outside the state.

Petitioner cites many, many cases — practically every modern decision involving interstate commerce! It is pointless to deal with them individually, since they are clearly irrelevant, as Judge Soper amply demonstrated in his opinion below (e.g., See R. 150a).

**(3) Plans and Specifications Are Not "Goods" as Used in Section 7(a) of the Fair Labor Standards Act of 1938 and Amendments Thereof (R. 116a).**

It is to be noted that this theory, advanced as Argument A by the Secretary of Labor in the District Court and the Court of Appeals, has here been relegated to Argument C, or the third line of attack.

In contending that respondents' employees are producing "goods" for commerce, the petitioner is strictly pioneering. The Department of Labor has yet to produce a single case holding that the preparation of plans and specifications constitutes the production of goods for commerce. Even in the *Brown Engineering Co.* case, elsewhere herein discussed and distinguished, the Court did not find that plans and specifications are "goods". Cases in which they (or similar work) are

specifically declared not to be goods in the sense that they could be the subject of "production of goods for commerce" are:

*McComb v. Turpin*, 81 F. Supp. 86;

*Scholl v. McWilliams Dredging Co.*, 169 F. (2d) 729;

*Kelly v. Ford, Bacon and Davis*, 162 F. (2d) 555;

*Laudadio v. White Construction Co.*, *supra*; and

*Bozant v. Bank of New York*, 156 F. (2d) 787.

The Department of Labor has this to say in its own Interpretative Bulletin, Part 776, Subpart A, General (May, 1950), Title 29, Chapter V, Code of Fed. Reg. (776.19(b)(2)) :

"On the other hand, the legislative history makes it clear that employees of a 'local architectural firm' are not brought within the coverage of the Act by reason of the fact that their activities 'include the preparation of plans for the alteration of buildings within the state which are used to produce goods for interstate commerce'. Such activities are not 'directly essential' enough to the production of goods in the buildings to establish the required close relationship between their performance and such production when they are performed by employees of such a 'local firm'." (Citing *McComb v. Turpin*, *supra*).

Since the Interpretative Bulletin concedes that an employee of a local architectural firm is not covered, even when working on "alteration of buildings . . . used to produce goods for interstate commerce", it is sophistry for petitioner to contend that the same employee, doing the same work, is covered by the Act merely because the building is located in another state.

Surely petitioner knows that the activity of the employee controls, not the physical location of the building.

In this regard, Congress in its 1949 amendments to the Act, curbed judicial expansion of its meaning in regard to production workers whose work was "necessary" to the production of goods. The 1949 amendments substituted for "*necessary*" the words "*closely related*" and "*directly essential*" (italics supplied).

*McComb v. Turpin*, 81 F. Supp. 86, is a case in which the facts are remarkably close to the facts of the case at bar. Within the year preceding trial, a Baltimore architecture and engineering firm had projects located in Pennsylvania, Virginia, and some other states, as well as Maryland. "The nature of such projects included a sewage treatment plant, alterations to a paint plant, designs for conveyor galleries in control towers, and similar engineering or architectural projects." It was stipulated that the Turpin firm would continue " . . . . to render professional services in connection with many kinds of structures and equipment, whether for original construction or for alterations or additions, and whether the clients owning or operating said establishments are engaged in interstate commerce or the production of goods for commerce or not. Mostly their services relate to the original construction of buildings rather than to additions or alterations. The plaintiff has filed as exhibits illustrative of the defendants' drawings and specifications, a familiar type of blueprint for an engineering or architectural project, and a voluminous set of specifications for a client to be used by it for obtaining bids for a particular project; and also a re-



port to a client, in the nature of an audit or appraisal of the value of work completed and still to be done by a contractor or sub-contractor."

Using italics for emphasis, Judge Chestnut makes it clear that the government did not even contend Turpin's employees were engaged in interstate commerce. It was actually conceded by the government that the employees were *not* engaged in commerce, a concession which flows naturally, said the Court, from the decision of the Supreme Court in *McLeod v. Threlkeld*, 319 U. S. 491, 497, 63 S. Ct. 1248, 87 L. Ed. 1538.

The opinion realistically and logically points out that, "although the test as to coverage of the Act is the nature of the activities of the employees rather than that of the employer, it is legally difficult to see how employees could be engaged in either interstate commerce or the production of goods for commerce unless the employers were so engaged."

Judge Chestnut, with impressive clarity and reason, then explained why plans, drawings, and specifications are not goods. "They are only a physical embodiment in words of professional conclusions . . . .". The opinion continues in the words of Justice Holmes in *Fed. Baseball Club of Baltimore vs. National League of Professional Baseball Clubs*, 259 U. S. 200, 208, 209, 42 S. Ct. 465, 466, 66 L. Ed. 898, 26 A.L.R. 357, ". . . . 'personal effort, not related to production, is not a subject of commerce. That which in its consummation is not commerce does not become commerce among the States because the transportation we have mentioned takes place . . . . a firm of lawyers sending out a member

to argue a case, or the Chataqua lecture bureau sending out lecturers, does not engage in such commerce because the lawyer or lecturer goes to another State'.

"Certainly the word 'goods' could not be construed to include professional advices *and its definition should not be construed to include the typewritten or mechanical expression by which the advice is given*" (italics supplied).

Apparently, the petitioner is asking this Court to hold that plans and specifications cannot be distinguished from telegrams for the purposes of this Act, and presumably that Lublin, McGaughy & Associates cannot be distinguished from the Western Union Telegraph Company. Both Judges Soper and Hoffman in their opinions in this case considered the case of *Western Union Telegraph Co. v. Lenroot*, 323 U. S. 490, and concluded that plans and specifications are not "subjects of commerce"; that telegrams are obviously and properly goods, based on the relationship of the message to Western Union as a unit of work rather than an idea. Obviously, Western Union is not a learned professional man giving his own professional advice to a particular *client* pursuant to that client's request, and its message is not professional advice.

In the oft-quoted case of *Bozant v. Bank of New York* (supra), 1946, 156 F. (2d) 787, Judge Learned Hand said:

"A lawyer who in the course of his practice writes letters, or draws deeds or wills, or prepares briefs and records, is not on that account within Section 203(j); *and the same is true of the correspondence of a broker and a banker*. The definition of 'goods' in 203(j) might literally go so far even as that; but it would be unreasonable to the last de-

gree to suppose that Congress meant to cover such incidents of a business *whose purpose did not comprise the production of 'goods' at all.*"

See also *Kelly v. Ford, Bacon and Davis*, 162 F. (2d) 555.

This aspect of petitioner's contention has been treated with piercing clarity in the Court of Appeals below as follows (R. 148a-149a):

"The practical distinction between the business of interstate communication by telegraph and the activity of making plans and drawings which are used merely as guides for building construction, is so obvious as not to deserve further discussion. Nor does the Powell case\* support the government's position. It does show that the term "goods" in Section 203 (i) of the statute is not limited to those bought and sold, but its holding that munitions of war are "goods" in no way tends to show that such articles as plans and specifications, which possess markedly different characteristics, are also "goods" in the statutory sense.

"The defendants in this case were independent engineers and architects engaged in essentially local activity in each of the offices which they maintained. They were not employed to manufacture documents to be sold or transported in interstate commerce but to give professional advice and assistance which of necessity was given permanent form as plans or specifications so as to be available for guidance and reference. Clearly such plans were not "goods" in the ordinary case, although it is possible to conceive a situation in which standard plans or blueprints for building con-

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\* Judge Soper here refers to *Powell v. U. S. Cartridge Co.*, 339 U. S. 497, which he readily distinguishes from the case at bar.



struction might be prepared for transportation or sale in such a way as to fall within the coverage of the Act. That, however, did not happen here. The copies of the plans that were made and sent out for the convenience of the clients and their bidders were not transported as subjects of commerce but in order to show the interested parties the sort of construction that was required; and the mere fact that the documents crossed state lines did not alter their inherent nature."

We sincerely believe that if plans and specifications are going to become "goods" under the Act, they should so be made by legislative fiat rather than judicial construction.

### ARGUMENT

Interstate activity, in order to put an employee "in commerce", must be a substantial part of his work week, and not merely "an incident of interstate business." *Kelly v. Ford, Bacon and Davis*, 162 F. (2d) 555 (C. A. 3, 1947). The entire *Kelly* opinion bears on the case at bar. In it, Judge McLaughlin stated:

"Merely because an occupation is indispensable in the sense of being included in the long line of causation which brings about so complicated a result as finished goods does not bring it within the scope of the Fair Labor Standards Act." *10 East 40th Street Building v. Callus*, *supra*. 325 U. S. 578, 65 S. Ct. 1227, 89 L. Ed. 1606, 161 A. L. R. 1263.

Although the employee in the *Kelly* case apparently sent and received several hundred pieces of correspondence through interstate mail, the Court found them to be "an incident of intrastate business," and that

"the mere writing of letters or the drawing of papers which have no value of their own except as records, are not to be counted." The opinion made a point of stating that the facts (construction of an aircraft plant) did not even present "a border line case."

*Collins v. Ford, Bacon and Davis, Inc.*, 66 F. Supp. 424, involved a draftsman employed by the same defendant, working on plans and specifications which were transmitted by the defendant to contractors both in and out of Pennsylvania for bids, execution of work, etc. The District Court held that Collins, the draftsman, was not "engaged in commerce", and Judge McLaughlin expressly approves that decision by referring to it in the Kelly case. Similarly, see *Damon v. Ford, Bacon and Davis, Inc.*, D. C., E. D., Pa., 62 F. Supp. 446, concerning the same defendant's chief field time checker.

If coverage is found in the instant case, the federal judiciary can expect to be busy for the next few years deciding which architects are, and which, if any, are not, engaged in interstate commerce, and then which lawyers, and ultimately which doctors. For there can be no clear-cut line drawn, nor any convenient criteria established to separate the covered firms from the 'local' firms, if the province of the professions is once invaded by judicial construction.

The instant case offers great hope to the Labor Department's attack on the professions, because the respondents' firm has several interstate markings. There are interstate offices, mailings, telephone conversations, and journeys. As put in evidence by the petitioner, military aircraft operating from bases where respondents' employees gathered data performed interstate flights.

Agencies using respondents' plans undoubtedly shipped them across state lines. All in all, the word "interstate" can be used many times in discussing the evidence in this case. However, this does not constitute commerce, and especially interstate commerce. If respondents' employees are held to be covered, the petitioner will have succeeded in placing the entering wedge in every architect's door, not to mention other professions. No architect or engineer today can run his office without interstate correspondence and travel.

It is submitted that interstate commerce contemplates *production, manufacture, transportation, shipment, or construction* as the primary activity of the employer. Purely professional services preliminary to any of those activities, or remotely connected therewith, or utilizing the same from time to time as an incident of local business, do not constitute interstate commerce. It is admitted that respondents' personnel in the direct employ of a *construction* firm might perform superficially similar work and "be engaged in commerce."<sup>\*</sup> But the similarity of work done would be only superficial, the involvement in commerce would be far more direct, and the employer's operations would be, in the strict sense of the word, non-professional and free of the type of regulation required by Virginia law for professions (R. 126a, et seq.). Professions, whether or not practiced across state lines, are licensed, regulated, and controlled by each state, and are regarded by the Act as local business. Congress has plainly indicated its purpose to leave local business to the protection of the states, and did not exercise in this Act the full scope of

\* See last question on R. 133a, and answer on R. 134a for vital distinction between function of contractor's draftsmen as contrasted with function of respondent's draftsmen.



the commerce powers. It could have gone further, but it did not see fit to do so. *Kirschbaum Co. v. Walling*, 316 U. S. 517, 62 S. Ct. 1116. In fact, as previously stated, in 1949 it narrowed the original scope of the Act.

In order to prove the interstate nature of respondents' activities, petitioner cites cases of the Supreme Court holding that North American Company, Associated Press, Underwriters Association, International Boxing Club of New York, and other national concerns are by their very nature interstate in character. We submit that these authorities are not appropriate. In holding that the great North American Company was engaged in interstate commerce and, therefore, subject to the orders of the S. E. C. (a case cited by the petitioner) in 327 U. S. 686, at page 694, the Supreme Court said:

"North American is more than a mere investor in its subsidiaries. . . . It is the nucleus of a far-flung empire of corporations extending from New York to California and covering seventeen states and the District of Columbia . . . The mails and the instrumentalities of interstate commerce are vital to the functioning of this system. *They have more than a casual or incidental relationship.* (Italics supplied). Such interstate commercial transactions involve the very essence of North American's business."

It seems to us beyond dispute that Congress never intended the Fair Labor Standards Act to extend to the limits herein alleged by the petitioner, and that the cases cited under the Sherman Act, Mann Act, and Fugitive Felon Act are entirely out of character. Let us be among the first to admit that parties who allow diseased cattle to roam across state lines, who engage

in the transportation of women across state lines for immoral purposes, and those who engage in writing insurance on a national level are definitely creatures of interstate commerce. We believe that the comparison between the businesses of those parties and the respondents simply will not stand up.

## **CONCLUSION**

The history of the Fair Labor Standards Act is somewhat like the old story of a stone cast into a pond. Not only does the stone produce a splash, but it causes ripples which may eventually touch every shore. The ripples of the Fair Labor Standards Act are now lapping at shores that the congressman who threw the original bill into the hopper could never have anticipated. The coverage originally intended by the Act, despite an intervening 1949 Congressional amendment to restrict its application, has been steadily extended in ever widening circles. In 1939, the Labor Department would not have dared to bring this action, so obviously far afield is its purpose from the properly defined scope of the original Act.

However, spurred on by its success in litigating cases of borderline coverage under the Act, the Labor Department, with its pioneer spirit, is attempting to land on the heretofore untouched shores of the professions. The enforcement history of the Act leaves no room for doubt that if any one profession is covered, then other professional groups will inevitably be included.

Finally, we respectfully call the Court's attention to the fact that the petitioner, not content with its stipulation, put on seven witnesses. These witnesses were

listened to, observed, and questioned by the trial court before it concluded that respondents' employees are not marked for coverage; that petitioner failed to prove its case. This, we submit, is entitled to weighty consideration. The Trial Court was, in turn, unanimously affirmed by the Court of Appeals.

There can be little doubt that the Fair Labor Standards Act was not promulgated to obtain salary increases for employees earning as much as the employees here (R. 140a, 141a). This was not "the mischief to be remedied by the Act . . . ." as expressed by Judge Chestnut in *McComb v. Turpin*, supra. Likewise, there can be little doubt that the Congress did not intend to seek coverage of the employees of professional architects and engineers not engaged in construction projects. We believe that none of the cases cited prove that the employees here were engaged in commerce or the production of goods for commerce. We urge the Court to affirm the findings and decisions of the courts below.

Respectfully submitted,

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**IN THE**  
**Supreme Court of the United States**  
**OCTOBER TERM, 1958**

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**JAMES P. MITCHELL**, Secretary of Labor, United States  
Department of Labor, *Petitioner*,

**v.**

**LUBLIN, MCGAUGHY & ASSOCIATES, ET AL.**, *Respondents*

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**On Writ of Certiorari to the United States Court of Appeals  
for the Fourth Circuit**

---

**BRIEF OF THE NATIONAL SOCIETY OF PRO-  
FESSIONAL ENGINEERS AS AMICUS CURIAE  
IN SUPPORT OF RESPONDENTS**

---

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1958

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No. 37

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JAMES P. MITCHELL, Secretary of Labor, United States  
Department of Labor, *Petitioner*,

v.

LUBLIN, McGAUGHY & ASSOCIATES, ET AL., *Respondents*

---

On Writ of Certiorari to the United States Court of Appeals  
for the Fourth Circuit

---

**BRIEF OF THE NATIONAL SOCIETY OF PROFES-  
SIONAL ENGINEERS AS AMICUS CURIAE  
IN SUPPORT OF RESPONDENTS**

---

**INTEREST OF THE AMICUS CURIAE**

Consent for the filing of this brief *Amicus Curiae* was granted by petitioner and respondents; stipulation of consent is being submitted simultaneously herewith.

The National Society of Professional Engineers, hereinafter referred to as the Society, is a non-profit membership corporation organized and existing under the laws of South Carolina, with headquarters maintained in Washington, D. C. It was founded in 1934 "as an educational institution [dedicated] to the promotion and the protection of the profession of engineering as a social and economic influence vital to the affairs of men and of the United States." (Extract from Constitution and Bylaws of the Society).

Membership in the Society is restricted to individuals who obtain and retain registration as a Professional Engineer or Engineer-in-Training under the engineering registration laws which are in force in all States, Territories, Possessions and the District of Columbia. The membership of the Society is approximately 46,000. Forty-six state societies of professional engineers are affiliated with the Society and within the state societies there are approximately 365 local chapters.

From its inception, the Society has interested itself in the effect of national laws on the engineering profession and in this connection it has taken a leading part in bringing to the attention of appropriate committees of Congress, from time to time, data bearing on the impact of federal legislation upon the engineering profession.

The principle in the case before this Court, which is a case of first impression, tests the question of whether employees of firms which render professional architectural-engineering services are subject to the provisions of the Fair Labor Standards Act, as amended. This question has been the subject of con-



licting opinions in the lower federal courts. A substantial portion of the engineering profession, including many members of the Society, are anxiously awaiting a determination by this Court which will settle conclusively the present uncertainty regarding the relationship of the Fair Labor Standards Act to consulting engineering activities.

According to the National Council of State Boards of Engineering Examiners there are approximately 227,000 professional engineers registered today in the various states, who are licensed under state law to engage in consulting engineering practice. These engineers have an interest in the outcome of the pending case. Analyses by the Society of the occupational status of its members indicates that of the estimated 227,000 registered engineers, approximately 25,000 professional engineers are actually in private practice. They and their staffs of employees have a direct and immediate interest in the disposition of this litigation.

With the sincere expectation of a ruling by this Court that the offer and performance of a professional service cannot be viewed as the type of ordinary business and commercial operation Congress intended to bring under regulation through the Fair Labor Standards Act, as amended, this brief is respectfully submitted.

#### QUESTION PRESENTED

In the opinion of the *Amicus Curiae* the question presented to this Court by the petitioner is stated in terms too narrow and restricted for a proper decision going to the heart of the issue before this tribunal. We submit that the issue here, in essence, is whether employees of a consulting professional firm which renders a service primarily intellectual, creative, non-

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standardized and unique in nature, requiring advanced knowledge and training in a professional field, are subject to the Fair Labor Standards Act, as amended, in the same classification as employees of business and commercial enterprises.

#### STATUTE INVOLVED

Pertinent provisions of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended, c. 736, 63 Stat. 910 (29 U.S.C. 201, *et seq.*) involved here are Sections 3(b), (i), and (j), as follows:

Sec. 3. [52 Stat. 1061; 63 Stat. 911]. As used in this Act—

\* \* \* \* \*

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.

\* \* \* \* \*

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation, directly essential to the production thereof, in any State.

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## SUMMARY OF ARGUMENT

## I

A. Plans and specifications prepared by employees of a consulting architectural-engineering firm constitute a physical reproduction of intangible professional advice and conclusions, and as such do not partake of the character of "goods" within the meaning of that term in the Fair Labor Standards Act. The distinction between commercial goods and the embodiment of creative ideas in tangible form for the exclusive use of a client has been recognized consistently in a series of court decisions, each of which is consistent in principle with the ruling of the court below. (*McComb v. Turpin*, 81 F. Supp. 86 (D.C. Md. 1948); *Washington Times Herald Inc. v. District of Columbia*, 213 F.2d 23 (D.C. Cir. 1954); *Bozant v. Bank of New York*, 156 F.2d 787 (2d Cir. 1946)).

This judicially accepted distinction between "goods" for commerce and items such as plans and specifications manifesting a professional service, is not contrary to the position of this Court in *Western Union Telegraph Co. v. Lenroot*, 323 U.S. 490 (1945). To Western Union, the permanent message which it produces is the embodiment of another's mental processes; it is a unit of work and the end product which the entire organization of Western Union is designed to produce. Plans and specifications, on the other hand, represent the ideas and advice of the consulting firm; they are prepared for the particular, personal and exclusive use of specific clients, and thus cannot be considered as articles of commerce in the generally accepted meaning of that term. Nor can plans and specifications be compared to munitions of war which this Court found to be "goods" in *Powell v. United States Cartridge*



*Co.*, 339 U.S. 497 (1950). Though prepared for the ultimate consumer, munitions of war can be used for a variety of purposes by varying numbers of persons or groups, and are properly embraced within the word "products" found in the definition of "goods" in Section 3(i). Plans and specifications, however, are prepared to meet the needs of a particular client which he may subsequently use, revise or discard, and as such cannot be considered "products" of commerce.

Petitioner avers that that plans and specifications prepared by a consulting engineer for use in the improvement of an interstate highway cannot be distinguished from concrete road materials prepared for the same purpose. Here again petitioner has failed to distinguish between items which represent the embodiment of professional judgment and determinations and end products of a manufacturing process. Plans and drawings prepared by a consulting engineering firm stand in no different light than deeds or contracts prepared by a law firm in connection with the construction of an interstate highway. Both are the product of professional ability and judgment; neither can be considered in the same category as construction materials actually incorporated into the physical highway itself.

B. The preparation of plans and specifications by employees of a consulting engineering firm does not meet the "closely related and directly essential" coverage test established in the 1949 amendments to the Fair Labor Standards Act. Even under the more liberal "necessary" test, in effect prior to 1949, employees of a consulting engineering firm under circumstances practically identical to those in the instant case were held not to have the required close

and immediate tie with the process of production so as to be covered by the Act. (*McComb v. Turpin, supra*).

Coverage under the amended language is predicated upon the employee's activity being both "closely related" and "directly essential" to the production of goods for interstate commerce. An important characteristic of consulting engineering destroys the validity of any argument that employees of such firms are engaged in activities "directly related" to the production of goods. That essential factor, assumed to the contrary by petitioner, is that the work performed by a consulting engineering firm is not in every instance intended or followed by the actual construction of a project. Aside from situations wherein the proposed project is delayed or abandoned by the client, a good deal of the time and effort of many consulting firms is taken up by the preparation of traffic surveys, feasibility studies, economic cost data reports and other plans purely of a preliminary nature. At other times, long-range studies complete with detailed plans and specifications are undertaken with the knowledge that such information is to be used solely for advance planning purposes. It is this factor which differentiates employees of a consulting engineering firm from draftsmen and fieldmen employed by construction contractors (whose work is always related to definite construction projects), and destroys an attempted analogy between them.

Congress, in the 1949 amendments to the Act, indicated a clear and positive intent to exclude from coverage those activities which were too far removed from production, i.e., activities that are essentially local in character. Read in its entirety, the State-

ment of the Managers on the Part of the House (Report No. 1453, 81st Cong.) indicates that the test for coverage is not whether the employer operates in one state or more than one state, but whether the employees' work is "closely related and directly essential to the production of goods for commerce." We submit that employees of local consulting architectural-engineering firms fail to meet this test for coverage. We further believe that the practice of engineering, like the practice of law, medicine, accounting or any of the other learned professions, is essentially a local activity, of the type which Congress *expressly* excluded from the coverage of the Act as not being "closely related or directly essential" to the production of goods.

## II

A. The generally accepted test for determining whether or not employees are engaged "in commerce" within the meaning of the Act was first stated in *McLeod v. Threlkeld*, 319 U.S. 491 (1943). As enunciated therein by this Court, the test to determine whether an employee is engaged in commerce is not whether the employee's activities affect or indirectly relate to interstate commerce, "but whether they are actually in or so closely related to the movement of the commerce as to be a part of it." Applying this test to respondents' employees, it can be seen that the preparation of plans, drawings and specifications is not so closely related to projects for the improvement, expansion or replacement of interstate instrumentalities as to "be a part of it." Rather, the only connection between employees of professional consulting engineers and interstate commerce is to "support" those who actually are engaged in interstate commerce, such as construction contractor, their employees and suppliers of material.



Cases on which petitioner relies to substantiate its assertion that respondents' "off-the-road, white-collar" employees are engaged in commerce are not authority for the instant situation. While "off-the-road" and "white-collar" employees of construction contractors can logically be held to be "in commerce" due to their close and immediate tie with their employer's activities, the same conclusion cannot be reached with respect to draftsmen and clerical employees of consulting engineers who, unlike firms engaged in actual construction, are not "so closely related to interstate commerce as to be a part of it."

Petitioner relies heavily on *Mitchell v. Brown Engineering Co.*, 224 F.2d 359 (8th Cir. 1955), *cert. denied*, 350 U.S. 875 (1955) to support its contention that respondents' employees are engaged in commerce and thus covered by the Act. While the Eighth Circuit in the *Brown* case concluded that employees of a consulting engineering firm were engaged "in commerce," such conclusion was influenced to a large extent, if not completely, upon the fact that Brown provided a resident engineer at the job site. Actually, however, the resident engineer was only the agent of the consulting firm and did not have the authority to control the construction; but rather, his function was to advise the consulting firm of progress, deviations and other factors relating the construction to the engineering design. In any event, this factor is not present in the instant case.

In our opinion the Eighth Circuit misapplied the "in commerce" test in holding that professional engineering services for completely local projects should be considered a link in the chain leading to interstate commerce transactions, and thus equate completely

local professional services to eventual "in commerce" results. We thought Congress had made it clear in the 1949 amendments to the Act that remote and drawn-out relationships to interstate commerce would no longer be permitted as a basis for sweeping local activity under the Act.

Where draftsmen and clerical employees are engaged in activities related to the construction efforts of third parties, rather than their immediate employer, as is true in situations involving employees of consultants, the courts have been consistent in holding that such work is not sufficiently closely related to interstate commerce so as to bring such employees within the Act's coverage. (*Kelly v. Ford, Bacon & Davis, Inc.*, 162 F.2d 555 (3rd Cir. 1947); *Collins v. Ford, Bacon & Davis, Inc.*, 71 F. Supp. 229 (D.C. Pa. 1946)). And when plans and specifications are silent regarding source of supply of required materials for construction, leaving this determination to the individual contractor or subcontractor, which is the usual procedure for consulting firms, the employees who prepare such plans do not have that degree of close relationship to the movement of goods in interstate commerce which would justify their being included within the provisions of the Act. (*Laudadio v. White Construction Co.*, 163 F.2d 383 (2d Cir. 1947)).

B. The interstate travel and communications of respondents' employees does not constitute an engagement in commerce within the meaning of the Act since, as the court below correctly stated, "there must be some relation to a business which is interstate in character" (App. A., p. 40). Petitioner's reliance on *United States v. Shubert*, 348 U.S. 222 (1955) and *United States v. International Boxing Club of New York*,

348 U.S. 236 (1955) to support its contention that the interstate activities of a consulting engineering firm (like the promotion of theatrical or boxing exhibitions) constitute trade or commerce, is misplaced. Such a broad extension of "trade or commerce" is untenable with respect to the independent practice of the professions (*The Schooner Nymph*, 18 Fed. Cas. 506 (1834)).

More in point, because of a similarity between the type of specialized services offered to specific clients, is *Mitchell v. Krout & Schneider*, 150 F. Supp. 857 (D.C. Cal. 1957) where the court held that employees of an investigative agency who conduct local investigations pursuant to contracts between the agency and its clients are not engaged in commerce within the meaning of the Act. Their work, like that of respondents' employees, is essentially local in character. It is important to note that the court in *Krout & Schneider* considered as irrelevant the fact that some of the investigations were conducted by out-of-state branches of the agency or that the agency's own offices, being located in different states, transmit inter-office correspondence across state lines.

Furthermore, the interstate travel of respondents' fieldmen does not constitute an engagement in commerce, for such activity is merely incidental to their primary duty to gather data for incorporation into the plans and specifications which represent the exercise of professional judgment. Such activity is no different from that of employees of leading law firms who travel across state lines to perform research, interview witnesses, check records, etc., in order to gather basic information which forms the basis for the lawyer's future strategy and courses of action.



## ARGUMENT

## I

THE PREPARATION OF PLANS, SPECIFICATIONS AND DRAWINGS BY EMPLOYEES OF PROFESSIONAL CONSULTING ARCHITECTURAL-ENGINEERING FIRMS DOES NOT CONSTITUTE THE "PRODUCTION OF GOODS FOR COMMERCE" WITHIN THE MEANING AND CONTEMPLATION OF THE FAIR LABOR STANDARDS ACT.

*A. Plans and specifications are a tangible reproduction of intangible professional advice and conclusions, and as such do not partake of the character of "goods" within the meaning of the statutory term.*

Petitioner seeks to establish the premise that plans, specifications and drawings, as evidence of professional advice or conclusions, are "goods" within the meaning of the Act by reference to a series of cases from which it is sought to derive *inferentially* that such items are to be considered in the same light as articles ordinarily sold to the public as "subjects of commerce." Petitioner, however, cites no case in which it has definitely been established that the embodiment of creative ideas in tangible form for the exclusive use of a client or specific class of clients are "goods" as defined in the Act.

On the other hand, several courts have expressly stated that the preparation of plans, specifications, or the embodiment of any specialized advice or opinion in tangible form to meet the needs of specific clients are *not* to be considered as coming within the established definition.

The very question before this Court, whether plans and specifications prepared by a consulting engineering firm are "goods," was considered in *McComb v. Turpin*, 81 F. Supp. 86 (D.C. Md. 1948) where the court there stated:

I do not think even this broad literal definition [goods] could fairly be construed to apply to the plans, drawings and specifications prepared by or under the supervision of the defendants or their employees. They are only a physical embodiment in words of professional conclusions.

• • • • •  
 Certainly the word 'goods' could not be construed to include professional advices and its definition should not be construed to include the type-written or mechanical expression by which the advice is given. These plans, drawings and specifications are not themselves the subject of barter or sale, but only the written embodiment of professional advice, and incidental thereto. They are specifically prepared to meet the particular problem of a specific client and are not sold or offered for sale to the public generally. They are, of course, quite unlike stocks, bonds and commercial paper which are themselves instrumentalities of commerce.

Judge Chesnut in the *Turpin* case, cites *Bozant v. Bank of New York*, 156 F.2d 787 (2d Cir. 1946), as clearly setting forth this important distinction. In the *Bozant* case it was stated at p. 787:

Some of the activities which went on, we agree, should on no theory be counted. A lawyer who in the course of his practice writes letters, or draws deeds or wills, or prepares briefs and records, is not on that account within s. 203(j); and the same is true of the correspondence of a broker and of a banker. The definition of 'goods' in s. 203(j) might literally go so far even as that; but it would be unreasonable to the last degree to suppose that Congress meant to cover such incidents of a business whose purpose did not comprise the production of 'goods' at all.

The reference by Judge Chesnut to the important distinction between articles produced for the consuming public, where the price paid covers the commercial value of the product itself as established in a competitive economy, and items such as plans, deeds or contracts, prepared for the use of a particular client or customer, where the price or fee received is compensation primarily for the advice or service and the mechanical expression of such creativeness is merely incidental, has been clearly stated in *Washington Times Herald Inc. v. District of Columbia*, 213 F.2d 23 (D.C. Cir. 1954). There the District of Columbia sought to levy a retail use tax on the purchase by a newspaper of mats bearing impressions of comic strips which were used in the first of a series of operations culminating in the production of a metal plate from which the comic page is printed. The sums paid by the newspaper for the comic strip mats greatly exceeded the price of blank mats.

Concluding that such transactions were within the exemption from sales and use taxes granted professional or personal service transactions, the Court of Appeals clearly pointed out that sales to the newspaper of comic strip mats with the right to reproduce them one time, were sales of professional and personal services of the artists which involved transfer of title to the mats, of inconsequential value, from which the drawings could be reproduced. It was further held that the price was paid for the artists' work, not for the mats themselves, and that the newspaper bought the creation of the artist and the right to reproduce it—not the material on which it was impressed.



There are other cases applying this same principle of distinction.<sup>1</sup> Under varying circumstances, all are evidence of the very real and recognized principle which differentiates commercial products in the generally accepted sense of the word from tangible items representing professional services, advice and conclusions, or artistic creativeness.

We submit that the judicially accepted distinction between products of trade and tangible manifestations of intangible advice or services precludes the contention that plans, specifications and drawings of a consulting engineer constitute "goods" within the meaning of Section 3(i), or that the work of preparing or assembling them amounts to the "production of goods for commerce."

Petitioner, however, has urged upon this Court (Brief, p. 42) that the accepted conclusion that plans and specifications are not "goods" is difficult to reconcile with *Western Union Telegraph Co. v. Lenroot*, 323 U.S. 490 (1945). Apparently a similar contention was made unsuccessfully ten years ago in *McComb v. Turpin, supra*, where the court clearly differentiated telegraphic messages from plans and specifications prepared by a consulting engineer.

In *Western Union vs. Lenroot*, 323 U.S. 490, 502, it was held that telegrams were goods within the definition of the Act because they were 'sub-

<sup>1</sup> See, for example, *Callus v. 10 East 40th Street Building*, 146 F. 2d 438 (2d Cir. 1944), reversed on other grounds, 325 U.S. 578 (1945); *Collins v. Ford, Bacon & Davis*, 71 F. Supp. 229 (D.C. Pa. 1946); *Scholl v. McWilliams Dredging Co.*, 169 F. 2d 729 (2d Cir. 1948); *Mitchell v. Krout and Schneider*, 150 F. Supp. 857 (D.C. Cal. 1957); and *Mitchell v. Household Finance Corp.*, 208 F. 2d 667 (3d Cir. 1953).

jects of commerce.' But that case does not apply here because the facts show that the plans and specifications are not sold or otherwise dealt in as 'subjects of commerce.' That case is inapplicable here for the further reason that the Court's holding that telegrams were goods was obviously and properly based on the relationship of the message to Western Union; and in that view, considering the function of Western Union, a message is a unit of work, rather than an idea. Certainly as to the author of the message, it is an idea or advice and not goods or a unit of work. Similarly, an artistic or literary contribution to a newspaper is certainly not goods insofar as the author is concerned, but it is clear that insofar as the publisher of the newspaper is concerned the newspaper is goods within the meaning of the Act.

We believe that this statement from the *Turpin* decision completely answers petitioner's claim in the instant case. As far as Western Union is concerned, it is not the author or creator of the telegrams which it dispatches and delivers across state lines. The permanent message which it produces is the embodiment of another's mental processes; Western Union merely reduces such ideas to tangible form and utilizes its facilities and personnel to transmit the message to its required destination. To the telegraph company, impersonal printed messages are the end products which its entire organization is designed to produce, and as such are "goods" produced by that company for interstate commerce. "Based on the relationship of the message to Western Union" telegrams cannot be considered for these purposes in the identical vein as plans or specifications created by consulting engineers for the particular, personal and exclusive use of clients.

Reference is made (Petitioner's brief, p. 6, 24) to "voluminous" and "bulky" plans and specifications prepared by consulting engineers in an obvious attempt to infer that these physical items are therefore "goods" and "subjects of commerce." It is true that in certain instances, highly complex and difficult projects require "voluminous" plans, drawings and detailed specifications. We also know that in many situations, where the problems encountered on a particular case are involved or confused, a lawyer's briefs, memoranda and correspondence become "voluminous" and sometimes "bulky." Is it not illogical to therefore conclude, as petitioner would have us do, that because the lawyer prepares "voluminous" and "bulky" material, he is engaged in the production of "goods" or "subjects of commerce" within the meaning of the statutory term?

We think so, and by the same token it is illogical to infer such a conclusion regarding the professional work of an engineering consultant. The bulk, or lack of bulk, of documents prepared by a consulting engineering firm are relevant only to the specific project for which they are prepared. Their size or quantity are not indicative of whether or not they can be classified as "goods" or "subjects of commerce."

Petitioner further declares (Brief, p. 46) that this Court's decision in *Powell v. United States Cartridge Co.*, 339 U.S. 497 (1950), supports the contention that plans and specifications, like munitions of war, are also "goods" in the sense of that word as defined in the Act. While the *Powell* decision did indicate that "goods" are not necessarily limited to those produced for sale or exchange, that decision in no way can be extended on that account to include plans or specifica-



tions. It is important to note that this Court found munitions to be "goods," even though, like plans or specifications, prepared for the ultimate consumer, because munitions are obviously embraced within the word "products" found in the definition of "goods" in Section 3(i). We would be closing our eyes to reality, however, were we to consider plans and specifications prepared by a consulting engineer as "products" in the generally accepted sense of the meaning of that word. Even though not bought and sold by the public generally, munitions of war are properly classified as "products" inasmuch as they can be used for a variety of purposes and by varying numbers of persons or groups. Plans and drawings prepared by a consulting engineer, on the other hand, are prepared to meet the needs of a particular client which he may subsequently use, revise or discard, and as such cannot be considered "products" of commerce.

*Alstate Construction Co. v. Durkin*, 345 U.S. 13 (1953) and *Thomas v. Hempt Bros.*, 345 U.S. 19 (1953), are urged by petitioner as authority for the proposition that plans and specifications prepared by a consulting engineer for use in the improvement of an interstate highway cannot be distinguished from the preparation of concrete road materials for the same purpose. Petitioner, however, fails to discern the major differentiating factor which has been alluded to earlier: that plans and drawings prepared by a consultant, including the instructions and specifications for the supplies and materials to be used in the construction process, are the embodiment of professional judgment and determinations; whereas the concrete road material is the end product of a manufacturing process. If petitioner's contention has merit, deeds and contracts

prepared by a law firm as necessary elements for the construction of an interstate highway could also be likened to the concrete road materials. Such a conclusion certainly is unreasonable. Plans and drawings prepared by a professional consulting engineering firm stand in no different light or relationship to the highway than the lawyer's deeds or contract forms. Both are the product of professional ability and judgment. Neither can be considered in the same category as construction materials actually incorporated into the physical highway itself.

The fact that plans and specifications prepared by a professional consulting firm include in detail all of the data, information and instructions necessary to adequately guide the client and his contractors, and that such plans involve the assembling of estimates, measurements, field data and other information, does not detract from their status as indicia of professional advice and judgment, and thus permit of their classification as "goods" as defined in the Act. The distinction is as ancient as the sixteenth century, as W. Somerset Maugham relates in his essay, "El Greco":

When the authorities taxed him upon the profits of his work at Illescas he [El Greco] fought them and got judgment in his favour. So far as I can understand the argument his contention was that what he sold was not canvas and paint, but the art with which he had arranged the paint, and this was not dutiable.

The consulting firm, like El Greco, does not sell plans, specifications and drawings (canvas and paint), but the professional skill and ability (art) with which

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\*"Mr. Maugham Himself," Doubleday and Co., Inc., 1954, Page 525, Essay "El Greco."

are arranged the estimates, measurements and other data (paint) into a finished set of plans or designs for the use of a client.\*

*B. The preparation of plans and specifications by employees of a consulting engineering firm does not constitute a "closely related process or occupation directly essential to the production" of goods for commerce.*

The "closely related" and "directly essential" criteria for determining whether employees are engaged in the production of goods for commerce were adopted in the 1949 amendments to the Fair Labor standards Act. Prior to the changes made in 1949, employees were deemed to be engaged in the production of goods for commerce if they were employed in any process or occupation "necessary" to the production of such goods. The Labor Department's Interpretative Bulletin, Section 776.17(a), General (May, 1950) states that:

The legislative history shows that the new language in the final clause of section 3(j) of the Act is intended to *narrow*, and to provide a more precise guide to, the scope of its coverage with respect to employees (engaged neither "in commerce" nor in actually "producing or in any other manner working on" goods for commerce) whose coverage under the Act formerly depended on whether their work was "necessary" to the production of goods for commerce. (emphasis added)

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\* See *Bozant v. Bank of New York*, 156 F. 2d 787 (2d Cir. 1946) at 790 where the court clearly pointed out the basic distinction between "the mere writing of letters or the drawing of papers, which have no value of their own except as records," and notes, stocks, bonds, bills of exchange and other negotiable paper which themselves have inherent commercial value.



Even under the admittedly more liberal "necessary" test, employees of a consulting engineering firm under circumstances practically identical to those in the instant case were held not to have the required close and immediate tie with the process of production so as to be covered by the Act. Referring once again to Judge Chesnut's able opinion in *McComb v. Turpin, supra*, we find the following discussion, based, to a large extent, on Justice Frankfurter's statement in *10 East 40th Street v. Callus*, 325 U.S. 578 (1945), that "remoteness of a particular occupation from the physical process is a relevant factor in drawing the line" between coverage and non-coverage:

In following this approach to the question we find in this case that the work of the employees does not have this required close and immediate tie with the production of goods. Their work is highly local in character \* \* \* far removed in space from the projects to which their work relates. It is even more remote in its causal relation to the production of goods. Goods intended for interstate commerce can only be produced either manually or mechanically. These employees in no way touch goods so to be produced. Their work relates only to the preparation of plans and specifications for a building or other construction work. The building or structure so planned for may or may not thereafter be built. If built, it may or may not be used for the production of goods for interstate commerce. If used for the production of such goods the buildings themselves are merely housing for manual and/or mechanical work by which the goods are produced. To the extent that machinery or other processes of manufacture are used, these employees have no part whatever therein. Men and machines are doubtless necessary to the production of goods in a factory and the factory building is doubtless necessary to house the men or machines and the plans may be neces-

sary for the construction or alteration of the building, the activities of the employees in preparing the plans may be said to be necessary to the comprehension of the architectural or engineering advice; but it seems clear that the employees' activities are only very remotely related to the production of goods.

The "closely related" and "directly essential" tests for coverage under the Act are not mutually exclusive. As stated in Section 776.17(a) of the Labor Department's Interpretative Bulletin, "Under the amended language, an employee is covered if the process or occupation in which he is employed is both 'closely related' and 'directly essential' to the production of goods for interstate or foreign commerce." Thus, aside from the question of being "directly essential" it is imperative that employee activities also be "closely related" to the production of goods for commerce in order for such employees to be covered. Petitioner, however, has consistently overlooked one important facet in the nature of consulting engineering which destroys the validity of any argument that employees of consulting engineering firms are engaged in activities "directly related" to the production of goods. That factor, mentioned by Judge Chesnut in the *Turpin* case, *supra*, is that the work performed by a consulting engineer is not in every instance immediately followed by the actual construction of the designed project. In instances, construction of the proposed project is delayed or abandoned altogether by the client.\*

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\* The recent extended controversy over construction of an additional span across the Potomac River is a perfect example of what can happen when a "client" changes his mind about a proposed project. In 1954 Congress authorized the construction of a bridge across the Potomac in the vicinity of Constitution Avenue (P.L. 704, 83d Cong., 2d Sess., 68 Stat. 961). Based on that authorization

Petitioner, erroneously assuming that actual construction always follows on the heels of the preparation of plans and drawings, is also apparently unaware that a good deal of the time and effort of many consulting firms is taken up, for example, by the preparation of traffic surveys, feasibility studies, economic cost data reports and other plans purely of a preliminary nature. Often, consulting engineers undertake long-range studies complete with detailed plans and specifications with the knowledge that such information is to be used solely for advance planning purposes, and that the contemplated projects possibly will never materialize, or will be materially altered necessitating revised plans and specifications.' For example, among

approximately \$250,000 had been obligated for detailed designs, specifications and other preliminary work at the proposed site. Then, in 1958, at the request of President Eisenhower and Interior Secretary Seaton, Congress amended the 1954 act to provide for a shifting of the proposed bridge approximately 800 feet upstream (P.L. 446, 85th Cong., 2d Sess., 72 Stat. 180). District Highway officials have indicated that the change in location will mean a substantial delay in construction because new plans and working drawings will have to be made and approved by Federal agencies.

\* That this possibility is not remote is evidenced by two examples of actual cases taken from the files of the Public Health Service in connection with the Construction Grants Program administered under the Water Pollution Control Act (P.L. 600, 84th Cong., 2d Sess., 70 Stat. 498, 502). In one case a new primary sewage treatment plant, with related facilities, was authorized for a village in New York State. Final plans were approved by the Public Health Service, and the Village was told to go ahead with the advertising for construction bids. The voters, however, rejected a bond issue to finance the construction, and the entire project was withdrawn.

In another instance, final plans were approved by the Public Health Service for rehabilitation of an existing sewage treatment plant in Wilmington, Delaware. The community, however, decided to dismiss the consulting engineer and have the proposed works redesigned. A new engineer was engaged, new plans were prepared, contracts were awarded and the project is now under construction.



the respondents' projects for improvement, repair or enlargement of interstate instrumentalities or facilities, which petitioner has listed in Appendix B, p. 45, 46, are: advance planning for runway extension, Byrd Field (Job No. 822, R. 20a); advance planning report for pneumatic test facility, Naval Air Station, Norfolk, Virginia (Job No. 921, R. 25a) and making the necessary site examination and preparing the advance planning report for relocating the Coast Guard Radio Station at Oceana, Virginia (Job Nos. 785, 917, R. 19a, 24a).

Congress itself has recognized the value of engineering studies, plans, surveys and drawings for advance planning purposes, under circumstances in which actual construction of the proposed projects is not necessarily immediately contemplated or may never be executed, by providing interest free loans to local communities for the advance planning of various types of public works projects.\* Planning advances are generally made for preliminary and basic planning which is conducted prior to the time that a final determination is made to proceed with financing and construction.

Thus any attempt to draw an analogy between draftsmen and fieldmen employed by construction contractors, whose work is always related to definite construction projects, and employees of professional con-

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\* Initiated by section 702 of the Housing Act of 1954 (P.L. 560, 83d Cong., 2d Sess., 68 Stat. 590 *et seq.*), and expanded later in the Housing amendments of 1955, the Federal Advance Planning Program now authorizes a \$48 million revolving loan fund for the planning of needed public works. Funds for advance planning cover the cost of engineering and architectural surveys, designs, plans, estimates, working drawings, specifications and other data preliminary to construction.

sulting engineers is totally without merit or foundation. Draftsmen employees and clerical workers were properly held covered by the Act in *Laudadio v. White Construction Co.*, 163 F.2d 383 (2d Cir. 1947) and *Ritch v. Puget Sound Bridge and Dredging Co.*, 156 F.2d 334 (9th Cir. 1946) since their work of preparing plans and drawings was "closely related" to the production of goods for commerce or interstate commerce itself. Draftsmen, fieldmen or clerical employees of consulting engineers, however, whose employment cannot be considered "closely related" to the production of goods for commerce, as can employees of construction contractors, are not properly embraced within the umbrella of coverage on this account.

Untenable also, is the contention that employees of consulting engineers always perform work, the nature of which is "directly essential" to the production of goods for commerce. Though unlikely, it is possible to construct a road or building without detailed engineering plans and specifications. In any event, as was stated in *10 East 40th Street v. Callus*, *supra*, "merely because an occupation is indispensable in the sense of being included in the long line of causation which brings about so complicated a result as finished goods, does not bring it within the scope of the Fair Labor Standards Act." [Citing cases].

In substituting the "closely related" and "directly essential" tests for the former "necessary" test, Congress, in the 1949 amendments to the Act, indicated a clear and positive intent to exclude from coverage those activities which were too far removed from production, i.e., activities that are essentially local in character. In connection with the 1949 amendments, the House Conferees in Report No. 1453, 81st Cong. pp. 14-15,

cited "some examples of cases in which the Administrator and the courts will no longer be able to hold the act applicable because the activities involved in such cases are not closely related or directly essential to production." Example 5 reads:

5. Employees of a local architectural firm whose activities include the preparation of plans for the alteration of buildings within the State which are used to produce goods for interstate commerce (1944-45 W. H. Man., pp. 138-139).

The above-quoted exclusion, adopted by the Labor Department in its Interpretative Bulletin (Sec. 776.19 (b)(2)), clearly applies to the respondent firm in the instant case, contentions of the petitioner notwithstanding. Petitioner relies on the alleged "interstate character" of the consulting firm to substantiate its claim that the firm's business is not essentially "local," and therefore not embraced within the express Congressional exclusion.

The petitioner misreads the intent of Congress in enacting the 1949 amendments to the Act, as related to the instant problem, and particularly as illustrated by the six examples of employees engaged in local activities who would no longer be considered within the Act's coverage. Read in its entirety, the Statement of the Managers on the Part of the House is clear that the purpose was to prevent the extension of coverage to employees of employers in local activity, in general. Thus, it is noted that "... an employee will not be covered unless he is shown to have a closer and a more direct relationship to the producing, manufacturing, etc. activity than was true in the above-cited cases." These cases pertained to employees of local merchants,



(*McComb v. Deibert*, (D.C. Pa. 1949)), employees engaged in maintaining and repairing private homes and dwellings and employees of a restaurant located in a factory (*McComb v. Factory Stores*, 81 F. Supp. 403 (D.C. Ohio 1948)).

The House report further noted that the amendments, on the other hand, would not remove from coverage employees of an independent employer performing work on behalf of a manufacturer, mining company, or other producer for commerce. If the consulting engineer is not a producer for commerce, as we contend, his employees are within the first category of the discussion, i.e., employees engaged in non-covered local activity whose work is not so closely related and directly essential to the production of goods for commerce. The test is not whether the employer operates in one state or more than one state, for the report points out that under the 1949 amendments "employees of public utilities, furnishing gas, electricity or water to firms within the State engaged in manufacturing, producing or mining goods for commerce, will remain subject to the Act."

Read in the light of the full discussion and explanation by the House Managers, the *examples* of corrective legislative action to prevent further improper extension of coverage refer back to the basic question of the employees' work being "closely related and directly essential to the production of goods for commerce."

As this Court said in *10 East 40th Street v. Callus*, *supra*, "We cannot be unmindful that Congress in enacting this statute plainly indicated its purpose to leave local business to the protection of the states. We must be alert, therefore, not to absorb by adjudication

essentially local activities that Congress did not see fit to take over by legislation." We submit that the practice of engineering, like the practice of law, accounting, medicine or any of the other learned professions, is "essentially" a local activity, of the type which Congress *expressly* excluded from the coverage of the Act as not being closely related or directly essential to the production of goods.

Petitioner, however, places great emphasis upon respondents' limited multi-state activities in an effort to include their employees under the coverage of the Act. This strategy flies in the face of the well-established rule, stressed by the petitioner, that coverage is "determined on the basis of the employee's activity and not by the nature of the employer's business." *Overstreet v. North Shore Corp.*, 318 U.S. 125 (1943).

A close examination of Example 5 from House Conference Report No. 1453, *supra*, indicates a Congressional intent to exclude from coverage "employees of a local architectural firm whose activities *include* the preparation of plans for the alteration of buildings within the State \* \* \*." (Emphasis added). The language does not apply the exclusion to local architectural firms whose activities "are limited" to the preparation of plans for the alteration of buildings within the State. Thus, we see clearly that Congress intended to remove from coverage architectural firms whose activities are "essentially" local, but which may nevertheless engage from time to time in out-of-state projects as required by their various clients and the scope of their practice. There is no evidence of Congressional intent to limit the exclusion to architectural-engineering practices conducted exclusively within the confines of a single state, as petitioner infers.

Nor, do we assume that by its *example* of an architectural practice, the Congressional intent can be read not to refer equally to engineering or other professional practice. In practice, it would be difficult, if not impossible, to draw a sharp distinction between architectural and engineering practice. The respondent firm is engaged in both professions, and this is a common and growing pattern of joint and overlapping interests in the design professions.

## II

THE VARIOUS ACTIVITIES OF EMPLOYEES OF PROFESSIONAL CONSULTING ARCHITECTURAL-ENGINEERING FIRMS DO NOT AMOUNT TO AN "ENGAGEMENT IN COMMERCE" WITHIN THE MEANING OF THE FAIR LABOR STANDARDS ACT.

*A. The preparation of plans, drawings and specifications and the miscellaneous clerical work of respondents' employees is not so closely related to projects for the improvement, expansion or replacement of interstate instrumentalities as to bring them within the "in-commerce" coverage of the Act.*

An accurate yardstick for determining whether or not employees are engaged "in commerce" within the meaning of the Fair Labor Standards Act was first stated in *McLeod v. Threlkeld*, 319 U.S. 491 (1943), and has been quoted approvingly ever since. As this Court declared in that case:

The test under this present act, to determine whether an employee is engaged in commerce, is not whether the employee's activities affect or indirectly relate to interstate commerce, but whether they are actually in or so closely related to the movement of the commerce as to be a part of it.

Applying the *Threlkeld* test, the Fifth Circuit in *Billeaudeau v. Temple Associates*, 213 F.2d 707 (5th



Cir. 1954), concluded that a watchman on a housing construction project who actually received lumber and invoices, and at times guarded employees unloading lumber, was not so closely related to the movement of interstate commerce as to be a part of it. "The effect, if any, such employees have on interstate commerce is, in our opinion, miniscule." If a watchman who actually receives and handles items of interstate commerce or closely supervises those who do handle it at the actual job site can be held by the Fifth Circuit not to be engaged in interstate commerce, we fail to see how draftsmen and clerical employees of a consulting engineer, further removed from interstate commerce than the watchman, can be held to be so "closely related to the movement of the commerce as to be a part of it."

"Closeness" under the *Threlkeld* test "depends upon the essentiality and indispensability of the particular work or services performed to the actual movement of commerce" (*Walling v. Consumers Co.*, 149 F.2d 626 at 629 (7th Cir. 1945)), and accordingly, Congress did not intend to bring within the Act on the basis of engagement in commerce every person whose labor is of some use or convenience, "or whose labor in some fashion contributes to the comfort or convenience of one who is so engaged." (*Johnson v. Dallas Downtown Development Co.*, 132 F.2d 287 (5th Cir. 1942)).

We submit that while the activities of employees of consulting engineering firms are useful, essential and convenient, such activities do not bear the close relationship to the movement of goods in interstate commerce, or interstate commerce itself, so as to be classified a part of such interstate commerce. In our

opinion, the relationship of employees of consulting engineers to the "in commerce" criteria for coverage is "miniscule."

As Justice Douglas clearly stated in his dissenting opinion in *Alstate Construction Co. v. Durkin*, *supra*:

A person who is maintaining or repairing interstate transportation facilities is 'engaged in commerce.' (Citing cases) A person who is creating articles destined for the channels of interstate commerce and all others who have such a close and immediate connection with the process as to be an essential or necessary part of it are engaged in 'the production of goods for commerce.' (Citing cases) If those who serve those 'engaged in commerce' are also included, a large measure of cases affecting commerce are brought into the Act. Yet the history of the Act shows that no such extension of the federal domain was intended. (Citing cases) If those whose activities are necessary or essential to support those who are 'engaged in commerce' are to be brought under the Act, I think an amendment of the Act would be necessary.

The only connection between employees of professional consulting engineers and interstate commerce is to "support" those who are actually engaged in interstate commerce (construction contractors, their employees and suppliers of material), and as such the employees of consulting firms cannot thereby be held to be so closely related to interstate commerce as to be a part of it.

Petitioner relies heavily on a series of cases in which it is alleged the courts have rejected the distinction between so-called "white collar" workers and manual laborers, and between "on-the-road" and "off-the-road" workers, and which therefore permit the con-

clusion that employees of consulting engineering firms, in their capacity as "off-the-road, white-collar" workers, are engaged in commerce to the same degree and extent as "manual, on-the-road" employees. This assumption by petitioner is misplaced, however, since the cases upon which petitioner relies are easily distinguishable from the instant situation. *Laudadio v. White Construction Co.*, *supra*, and *Ritch v. Puget Sound Bridge and Dredging Co.*, *supra*, held that the Act applied to draftsmen and clerical employees of *construction contractors* engaged in runway extension and channel dredging where the construction of such projects is judicially well-settled as being "in commerce." While "white-collar" employees of construction contractors can logically be held to be "in commerce" due to their close and immediate tie with their employer's activities, the same conclusion cannot be reached with respect to draftsmen and clerical employees of consulting engineers who, unlike firms engaged in actual construction, are not "so closely related to interstate commerce as to be a part of it." By stating that the projects in the *Ritch* and *Laudadio* cases are "of the same kind that comprise a primary part of the business of the respondents," (Brief p. 27) petitioner has lost sight of the vital fact which distinguishes the instant case from *Ritch* and *Laudadio*, i.e., the respondent consulting firm is *not* a firm of construction contractors.

Neither is petitioner's position strengthened by reliance on *Thomas v. Hempt Bros.*, *supra*, and *Alstate Construction Co. v. Durkin*, *supra*. The *Hempt Bros.* case held the Act applicable to employees engaged in the preparation of cement mixtures for physical incorporation into roads and highways, easily distin-



guishable as commercial products from plans and specifications which are a manifestation of professional advice and conclusions. The operations in *Alstate Construction Co.*, which involved the preparation of materials primarily for use in its own road construction work, are far removed from the activities of a consulting engineering firm which prepares plans and specifications for the exclusive use of a specific client.

Notwithstanding petitioner's strong contentions to the contrary, we believe that the preparation of plans and specifications by a consulting architectural-engineering firm is too remote from the repair and improvement of instrumentalities of interstate commerce to be within the Act's coverage, and that the court below presented a correct evaluation of the entire situation when it stated: "There is, however, no clean-cut holding that the work of employees of independent architects, such as are before us in this case, is 'commerce' under the Act." (App. A. p. 41).

Of all the cases cited by petitioner, only *Mitchell v. Brown Engineering Co.*, 224 F.2d 359, 8th Cir. 1955), cert. denied, 350 U.S. 875 (1955), factually compares with the instant case. While the Eighth Circuit in the *Brown* case concluded that non-professional employees of a consulting engineering firm were engaged "in commerce," such conclusion was influenced to a large extent, if not completely, upon the fact that Brown provided a resident engineer at the job site whose work "was a vital factor affecting the progress of the construction project." The duties of the "resident engineer" included the inspection of all incoming materials, inspection of the work as it was completed and the preparation of progress reports. These "job-

site" services provided by Brown led the Eighth Circuit to conclude that "the completion of a project depends in no small way upon the services rendered by defendant's employees," and "[t]o hold that the 'resident engineer' exercises no control over the work of the contractor and does not perform a vital function in the total activities of a construction project, is to turn away from the realities and practical considerations of the situation \* \* \*." There is no evidence in the record that respondents in the instant case, like Brown, provide "resident engineers" at the job site. ○

We think that the Eighth Circuit placed undue emphasis upon the function of the resident engineer in relation to the control and completion of construction. Actually, he was only the agent of the consulting firm and did not have the authority to control the construction; but, rather, his function was to advise the consulting firm of progress, deviations and other factors relating the construction to the engineering design. The Eighth Circuit dismissed as of "minor significance" the fact that the resident engineer was employed by and under the direction and control of the consulting engineer, whereas in *Laudadio* and *Ritch* the employees in question were employees of and under the direction and control of the construction contractor. We submit that the distinction is of major significance.

Further, we suggest that the Eighth Circuit misapplied the "in commerce" test in the light of the previous decisions of this Court and the lower courts in holding that professional engineering services for completely local projects should be considered a link in the chain

leading to interstate commerce transactions, and thus equate completely local professional services to eventual "in commerce" results. It is difficult to understand the Eighth Circuit's disregard of the clear Congressional intent to exclude remote employee activity in relation, for example, to Brown's preparation of plans and specifications for an addition to a local power plant which supplies power to a railroad, which, in turn, hauls freight, in part, in interstate commerce. We thought Congress had made it clear that this type of remote and drawn-out relationship to interstate commerce would no longer be permitted as a basis for sweeping local activity under the Act.

To hold that employees of professional consulting engineering firms are engaged "in commerce" is to do violence to accepted principles laid down in a series of cases which involved employee activity comparable to that performed by respondents' employees in the instant situation. (*Collins v. Ford, Bacon & Davis, Inc.*, 71 F. Supp. 229 (D.C. Pa. 1946), and *Kelly v. Ford, Bacon & Davis, Inc.*, 162 F.2d 555 (3d Cir. 1947)).

In *Collins*, defendant engineering company was supervising the construction of a plant in Pennsylvania. Plaintiff, an employee of defendant, prepared plans and drawings for the defendant which were sent outside of the state and were used by contractors in submitting bids for construction work at the plant. The court, granting judgment for the defendant, ruled that "the preparation of plans and the writing of letters, as a result of which persons other than the employer procure materials outside the state and ship them into Pennsylvania for use in performing their own inde-



pendent contracts, constitute neither the production of goods for commerce nor engaging in commerce within the meaning of the Fair Labor Standards Act." Applying the *Threlkeld* "in commerce" coverage test, the court continued by stating:

It may be that the present plaintiff's employee activities, resulting in purchases and shipments by subcontractors for performance of their contracts in Pennsylvania, 'affect or indirectly relate to' interstate commerce but they are clearly not 'actually in or so closely related to the movement of the commerce as to be a part of it.'

In *Kelly*, the employee's duties were confined solely to processing extra work orders in connection with the construction of a new factory. These work orders, in reality, were "contracts for additional original construction" and as a result of the work orders equipment came from out of state to the subcontractors for use by them in their part of the construction of the plant. Concluding that plaintiff's activities were not sufficiently closely related to interstate commerce so as to bring him within the Act's coverage, the court stated that: "while plaintiff may have collaterally affected the movements of the materials and equipment we do not consider that it is within the contemplation of the Act to say that what he did bore the necessary close tie to commerce called for by the decisions."

Both in *Collins* and *Kelly* it is evident that the courts clearly recognized and gave effect to the fact that the work of the draftsmen in those situations was related to the construction efforts of third parties, rather than their own employer. Similar circumstances are present in connection with the relationship of employees of consulting engineering firms to actual construction. The

work of employees involved in the case before this Court is used by third parties as a basis and as a guide for their own construction activities. Such a situation is clearly distinguished from the cases relied on by petitioner where draftsmen prepared plans and specifications exclusively for use by their immediate employers who were engaged in the business of actual construction.

Furthermore, while plans and specifications prepared by employees of consulting engineers usually specify the types and qualities of materials to be incorporated into the various projects, they are silent regarding source of supply, leaving this determination to the individual contractor or subcontractor. Under these conditions, the employees who prepare such plans and specifications do not have that degree of close relationship to the movement of goods in interstate commerce which would justify their being included within the provisions of the Act. The Second Circuit in *Laudadio v. White Construction Co., supra*, (strongly relied on by petitioner) clearly pointed this out where it commented that if the items designated by the draftsmen for incorporation into the project "could have been obtained either from depots within the state or from depots outside the state so that the decision as to which source to utilize rested wholly within the discretion of the purchasing department, we do not think that the plaintiffs were 'engaged in commerce,' although in fact the goods were ordered from outside the state."

And as the Second Circuit further stated in *Laudadio*, "It is the physical immediacy of connection with actual transportation movement that determines

whether an employee's activities cause him to be 'engaged in commerce.' " We submit that the employees involved in the instant case do not have the required "physical immediacy of connection" with the interstate movement of goods so as to properly be considered as 'coming within the "in commerce" provisions of the Fair Labor Standards Act.'

*B. The interstate travel and communications of respondents' employees do not constitute an engagement in commerce within the meaning of the Fair Labor Standards Act.*

Petitioner contends that the interstate communication by telephone and correspondence, the preparation of plans, specifications and drawings mailed to clients out-of-state, and the gathering of data to be used in the preparation of plans and specifications, all by respondents' employees, constitutes an "engagement in commerce" within the meaning of the Act. Petitioner cites numerous cases to support its position that interstate communication, regardless of character, is engagement in commerce, and refers to *Mitchell v. Vollmer*, 349 U.S. 427 (1955), for the admonition that the statutory terms of coverage of this Act must be given a "liberal" construction. From whose point of view should "liberal" be approached: the Department of Labor or the individual architectural-engineering firms throughout the country to whom the Department would

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<sup>7</sup> See also *Scholl v. McWilliams Dredging Co.*, 160 F. 2d 729 (2d Cir. 1948) where the firm agreed to provide engineering services for the construction of certain outlying bases in Greenland and the court ruled that the preparation of plans and specifications and the transmission of them in interstate commerce for use in construction activities are not activities within the contemplation of the Act.



extend coverage contrary to the meaning and intent of Congress? We believe this query was answered by this Court in *McLeod v. Threlkeld*, *supra*, when it said: "Congress did not intend that the regulation of hours and wages should extend to the furthest reaches of federal authority."

This interpretation was reiterated, in essence, by the court below when it stated that: "the mere use of the mails and of transportation facilities across state lines is not necessarily interstate commerce. There must be some relation to a business which is interstate in character." (App. A., p. 40). "Indeed, were it otherwise, the Act would sweep into its maw every business, however local, which manufactured nothing whatever, merely because it was carried on by correspondence, which is the case with all business." (*Bozant v. Bank of New York*, *supra*, p. 789).

Petitioner relies on *United States v. Shubert*, 348 U.S. 222 (1955), and *United States v. International Boxing Club of New York*, 348 U.S. 236 (1955), in which certain activities of promotional enterprises were held to constitute trade or commerce within the meaning of the Sherman Act, to support its contention that the interstate activities of a consulting engineering firm likewise constitute trade or commerce. Such a broad extension of "trade or commerce" is untenable with respect to the independent practice of the professions in view of Justice Story's statement in *The Schooner Nymphe*, 18 Fed. Cas. 506 (1834), that: "Wherever any occupation, employment, or business is carried on for the purpose of profit, or gain, or a livelihood, not in the liberal arts or in the learned professions, it is constantly called a trade." (Emphasis added).

Nor are *Edwards v. California*, 314 U.S. 160 (1941), or *Caminetti v. United States*, 242 U.S. 470 (1917) proper authority to support the proposition advanced by petitioner that the interstate travel of respondents' fieldmen to gather data and make surveys constitutes interstate commerce. For it was in *Kelly v. Ford, Bacon & Davis, Inc.*, *supra*, a case under the Fair Labor Standards Act, that the Third Circuit declared: "Decisions such as *Edwards v. People of State of California*, 314 U.S. 160, and *Caminetti v. U. S.*, 242 U.S. 470, stating the principle that transportation of persons between the states is interstate commerce have no relevancy to our query."

*Mitchell v. Kroger Co.*, 248 F.2d 935 (8th Cir. 1957) (traveling auditors of a multi-state food chain organization) and *Aetna Finance Co. v. Mitchell*, 247 F.2d 190 (1st Cir. 1957) (employees of a branch office of a small loan company) are not particularly germane to the instant question. More in point, because of a similarity between the type of specialized services offered to specific clients, is *Mitchell v. Krout & Schneider*, 150 F. Supp. 857 (D.C. Cal. 1957) where the court held that employees of an investigative agency who conduct local investigations pursuant to contracts between the agency and its clients are not engaged in commerce within the meaning of the Act, since their work, like that of respondents' employees, is essentially of a local nature. The court in *Krout & Schneider* noted as irrelevant the fact that some of the investigations were conducted by out-of-state branches of the agency, that the investigative reports made by the agency for the local offices of interstate insurance companies may be passed on by those local offices to their central offices located in other states, or that the

agency's own offices, being located in different states, transmit inter-office correspondence across state lines. The entire operations of respondents' employees are practically identical to those of the multi-office investigative agency in *Krout & Schneider*, and on the basis of that decision likewise cannot be held to be "in commerce."

That interstate travel by a firm's employees pursuant to their duties cannot amount to interstate commerce under a "liberal" construction of the Act is further evidenced by the decision in *Schaeffer v. Fraser-Brace Engineering Co.*, 104 F. Supp. 871 (D.C. Tenn. 1952) where it was held that an expeditor employed by a construction contractor to travel around the country to speed delivery of materials was not engaged in commerce, the court concluding that "The effect of his activities on commerce was incidental to his main activity and interest."

The interstate travel of respondents' fieldmen is incidental to their primary duty to gather data for incorporation into the plans and specifications prepared by draftsmen and other employees. Fieldmen of a consulting engineering firm who travel across state lines to gather data, which forms the basis for the future exercise of professional judgment and skill, are no different in character or function from employees of leading law firms who travel across state lines to interview witnesses, check records, etc., which information forms the basis for the lawyers' future strategy and courses of action. Certainly no one would question but that the lawyer's employee was not engaged in commerce. By the same token, the contention that fieldmen of a consulting engineer are engaged in commerce is similarly without merit.



Court decisions are clear that the preparation of plans, letters, reports and other printed matter, the inter-state transportation of which is merely incidental to a firm's primary business, does not constitute an engagement in commerce. In *Kelly v. Ford, Bacon & Davis, Inc., supra*, the contention was made that the preparation and mailing of letters and work orders constituted interstate commerce. The court reasoned, however, that even if such letters crossed state lines, "we are satisfied from our independent examination of the evidence \* \* \* that these were an 'incident of intra-state business.' "

Likewise in *Bozant v. Bank of New York, supra*, the Second Circuit noted that "the mere writing of letters or the drawing of papers, which have no value of their own except as records, are not to be counted."

And again in *Kelly v. Ford, Bacon & Davis, Inc., supra*, "What he [the employee] did remotely affected commerce, but the gap between the primary intrastate operation and the collateral interstate commerce feature was not bridged for any practical purposes by the processing and mailing of the orders and letters which appear in this matter."

Thus, we submit, that where an operation is primarily intrastate, as is respondents', the incidental inter-state travel of employees, the preparation and mailing of plans, specifications and correspondence and the interstate communication do not, in and of themselves, constitute an "engagement in commerce" on behalf of employees conducting such activities.

That this proposition has merit is supported by petitioner's own admission (Brief p. 40, f.n. 16) that

"correspondence and communications merely incidental to an ordinary local practice of law, medicine or other profession" is not within the Act's coverage. Consulting architectural-engineering firms, like physicians or firms of lawyers, are engaged in the ordinary local practice of a learned profession.

#### CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals for the Fourth Circuit be affirmed.

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